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ABSTRACT

This report addresses the need for policy change in rape cases and suggests ways in which the prosecutor can encourage reporting of rape, more sensitive treatment of victims, and more rape trials and convictions. Standardized reporting forms listing all elements necessary for successful prosecution should be developed for both police and court use, and greater cooperation must be established. Standardized forms for evidence-gathering at the hospital are also suggested, and samples are included, since close cooperation with hospital personnel is crucial. The special problems of bringing a rape case to trial are also addressed and the role of the prosecuting attorney during pretrial, trial and sentencing procedures is discussed in detail. The report emphasizes the need for an aggressive office policy, stating that only if there is clear direction from administrators will individual deputies seek convictions in rape cases. (Author/KA)

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Forcible Rape

Prosecutor
Administrative and Policy Issues

Prosecutors' Volume III

U.S. DEPARTMENT OF HEALTH,
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National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

Forcible Rape

Prosecutor
Administrative and Policy Issues

Prosecutors' Volume III

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March 1978

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

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ABSTRACT

Traditionally, the prosecutor's office has put low priority on rape cases, assuming the impossibility of conviction. At the same time victims were treated unsympathetically. This report addresses the need for policy change and suggests ways in which the prosecutor can set a tone which will encourage reporting of rape, lead to more sensitive treatment of victims, and result in more rape trials and convictions.

Typically, rape has not been aggressively prosecuted. Only 3 percent of these cases actually come to trial and their victims have often been subjected to badgering and harassment during trial preparation. Commitment for change must come from top administrative levels of the prosecutor's office. Since a case is no better than the evidence collected, close cooperation with police must be established. Standardized reporting forms listing all elements necessary for successful prosecution should be developed for both police and court use. Greater cooperation must be established with hospitals as well, since doctors and other examining personnel must also understand the special problems of collecting rape evidence. Therefore, standardized forms for evidence-gathering at the hospital are also suggested and samples included. The special problems of bringing a rape case to trial are also addressed and the role of the prosecuting attorney during pretrial, trial, and sentencing procedures is discussed in detail.

Because rape cases are more difficult to prosecute than most other felonies, the temptation is to plea bargain or to decide not to file charges. Therefore, the report emphasizes the need for an aggressive office policy, stating that only if there is clear direction from administrators will individual deputies vigorously and imaginatively seek convictions in rape cases.

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NOTE:

The complete results of this project are included in 11 research products. This volume represents the findings of one part of a comprehensive study of rape and the criminal justice system response. Additional research findings and recommendations are available in the following publications and reports. Copies may be purchased from the Government Printing Office.

Forcible Rape: A National Survey of the Response by Police (Police Volume I)
Forcible Rape: A Manual for Patrol Officers (Police Volume II)
Forcible Rape: A Manual for Sex Crimes Investigators (Police Volume III)
Forcible Rape: Police Administrative and Policy Issues (Police Volume IV)
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PREFACE

The criminal justice system must respond to the crime of rape at many levels. This report is one of a series of documents which explore the range of potential responses. They are the result of a two-year study of rape undertaken by the Battelle Law and Justice Study Center and funded by a grant from the National Institute of Law Enforcement and Criminal Justice (NILECJ) of the Law Enforcement Assistance Administration.

The Battelle Center adopted several research strategies to assure a comprehensive examination of this crime. A total of 208 police departments and 150 prosecutors' offices were surveyed with respect to their procedures and policies toward rape. In addition, 1,261 case reports from five metropolitan police departments were analyzed to determine the circumstances under which reported rape offenses occurred, the extent of injury inflicted on victims, and the manner in which cases were handled by police, prosecutors, and courts. Extensive interviews were conducted with 65 prosecutors, 369 police officers, and 146 rape victims in six cities throughout the country. These interviews were designed to explore how policy was implemented at various levels of the criminal justice system and what problems the interviewees perceived in the system's response to rape. Finally, the legal literature concerning rape was reviewed and the status of rape law in every state was determined by a nationwide telephone survey.

This document focuses on the policy issues raised by the crime of rape that should be addressed by prosecutors in administrative positions. A companion document entitled *Forcible Rape: A Manual for Filing and Trial Prosecutors* discusses many of the same issues from the perspective of the attorney who is involved in the daily prosecution of cases. These documents have been based on structured interviews conducted with 40 trial deputies and 25 prosecutors in policymaking roles.

The purpose of this document is to raise and discuss those policy issues which seem fundamental to the aggressive prosecution of rape cases. It considers strategies and programs that prosecutors' offices have recently adopted to combat the problems posed by rape cases. Many of these problems have required decisions by prosecutor administrators rather than trial deputies, for they have involved resource allocation and other fundamental policy questions. It is hoped that this document will raise questions and stimulate discussion among prosecutors regarding the adequacy of their present response to rape and the possibility for change.

To facilitate clarity of style, an editorial decision has been made that rape victims and victim advocates will be referred to as "she." All other persons, including prosecutors, will be referred to as "he." This is clearly an arbitrary distinction, though it accurately reflects the prevailing pattern of sexes involved in rape cases and their disposition.

CHAPTER 1. INTRODUCTION

The recent public attention focused upon the crime of rape has often manifested itself in vigorous criticism of the prosecutor.[1] Because he plays an integral part in the criminal justice process, the prosecutor has been identified with the meager record of the entire system. It is estimated, for example, that less than 2 percent of all reported rapes result in a conviction for rape.[2] As a public official who is an influential member of the criminal justice system, the prosecutor inevitably must share responsibility for this failure.

Until recently, prosecutors in administrative positions have perceived the crime of rape as roughly analogous to other major felonies, such as robbery or homicide. The process of screening, establishing probable cause, and plea bargaining rape cases has been virtually identical to every other felony. It has become increasingly apparent, however, that rape is different. Rape cases have consistently weak factual patterns, rape victims are often very reluctant to report or testify, and discretionary decisions are particularly susceptible to the interjection of personal biases with respect to women and sexuality. The traditional treating of rape cases like any other felony seems only to perpetuate the existing cycle of low reporting, filing, and conviction rates.

Some prosecutors, often as a result of public criticism, have taken a closer look at the pattern of rape and its impact on victims. They have essentially concluded that rape cases pose prosecutorial problems that must be specifically addressed by policy makers.[3] Some changes are being instituted already. Prosecutors have created specially trained filing units whose personnel are more sensitive to victim needs. Rape cases have been assigned to certain rather than all trial attorneys within an office in order that expertise can be cultivated and consistent decision making insured. Prosecutors have appointed victim advocates within their own offices, formed closer liaison with the police, lobbied for legislative change, and promulgated aggressive filing and plea bargaining standards. All of these programs have begun to demonstrate that the criminal justice system can win rape cases and support the victims of this crime.

There are several features of the crime of rape and the traditional response of the criminal justice system that distinguish it from other felonies. Though rape is surely not unique in its demands upon a beleaguered criminal justice system, an analysis of its policy implications should begin with an acknowledgment of its special characteristics.

The victim. The prosecutor's concern with the rape victim is two-fold. First, the rape victim, as a victim of crime, deserves the attention, concern, and understanding of the prosecutor. While the violence experienced by the rape victim may be similar to the trauma known by other victims, it is clear that the impact of this crime is often special and profound. The prosecutor, as a government official to whom the victim has turned, has an obligation to respond appropriately to her needs.

The victim is also the most important witness in the state's case. The prosecutor must formulate policy that will encourage the victim to prosecute. The selection of personnel to interact with rape victims, the requisite training needed to facilitate communication and victim support, and the appropriate staffing that will ensure continuing contact by one prosecutor with each victim, all call for decisions at the policy making level.

The crime. The nature of the crime itself raises several problems for the policy maker in the prosecutor's office. Rape cases are very difficult cases to win and, as a result, there is a tendency at all points of decision making, including filing and plea bargaining, to act conservatively. Rape is also shrouded in myth. The defense against it is often consensual intercourse, and it is subject to the biases of prosecutors toward women, sexuality, and even race. The administrator should be confident that discretionary decisions are made in a consistent pattern. Presently, rape cases tend to be viewed on an *ad hoc* basis subject to influence by irrelevant and even illegitimate factors.

The criminal justice system. The methods by which the criminal justice system responds to the crime of rape are already undergoing significant changes. Some police departments have instituted intensive training and have specialized units to investigate rape complaints.[4] Many hospitals have developed protocols for the examination and treatment of rape victims.[5] In most large jurisdictions, a rape crisis line is available to assist victims.[6] The prosecutor must be aware of these programs, and should interact with them in the pursuit of common goals. Where such programs do not exist, the prosecutor, as an elected official, may have a special responsibility to work for their development

The law. As recent law review commentaries and legislative reforms imply, the traditional rape law has been undergoing profound change.[7] Ongoing legislative activity with regard to the admissibility of evidence, the definition of the crime, and the penalty structure of rape

should alert the prosecutor to the need for active involvement with law reform. The prosecutor must keep abreast of legal change; he must also be in a position to influence the legislative debate as a representative both of the electorate and of the criminal justice system. In addition, much of the legislative reform has been achieved with promises that there will be increased prosecution. The prosecutor must be aware of the public expectations surrounding the implementation of these reforms.

The public. At the same time that part of the public insists on more aggressive rape prosecution, another part, often seated as jurors, seems unwilling to label an individual as a rapist except in the most compelling of cases.[8] Thus, while there may be pressure to file more cases, there is also the practical reality that social attitudes may make these cases particularly difficult to win at trial. This dilemma suggests there is a need for careful judgment in the filing, plea bargaining, and trying of rape cases. Conservative public attitudes toward this crime may ultimately require the prosecutor to become actively involved in a program of public education.

These are some of the issues that the administrator of a prosecutor's office should address in determining policy and allocating resources with regard to rape. There are no obvious, universally applicable policy decisions to be adopted; the office policy toward rape that is ultimately chosen will depend on local practice, resources, and ideology. It does seem clear, however, that "business as usual" with regard to rape means very low reporting and conviction rates. To institute change, policy must be developed from the top.

This document begins by providing basic information about rape and its victims. Only if prosecutors can appreciate the nature of this crime and its likely impact on victims, will they be able to make the requisite legal and policy judgments with respect to rape. The manual then discusses various prosecutorial strategies considered around the country to combat this crime. These include programs to provide victim services, reform rape laws, restructure prosecutor offices and formulate filing and plea bargaining standards. Finally, this document considers the importance of prosecutor interaction with police and medical personnel to facilitate the prosecution of rape cases. Policy makers can consider these issues in evaluating their own office's response to rape and in charting policy for the future.

NOTES

[1] See Carol Bohmer and Audrey Blumberg, "Twice Traumatized: The Rape Victim and the Court," *Judicature*, 58 (1975), pp. 391–399; Ann Burgess and Lynda Holmstrom, "Rape Victim Counseling: The Legal Process," *Journal of the National Association for Women Deans, Administrators and Counselors* (Fall, 1974), pp. 24–31; Lynda Holmstrom and Ann Burgess, "Rape: The Victim and the Criminal Justice System," *International Journal of Criminology and Penology*, 3 (1975), pp. 101–110; Nancy Gager and Cathleen Schurr, *Sexual Assault: Confronting Rape in America* (New York: Grosset and Dunlap, 1976); Sybil Landau, "Rape: The Victim as Defendant," *Trial*, 10 (July-August, 1974), pp. 19–22; Sally Mathiasen, "The Rape Victim: A Victim of Society and the Law," *Williamette Law Journal*, 11 (1974), pp. 36–55; Pamela Lakes Woods, "The Victim in a Forcible Rape Case: A Feminist View," *American Criminal Law Review*, 2 (Winter, 1973), pp. 335–354.

[2] Of the 635 reported rapes from Seattle, Washington (1974) and Kansas City, Missouri (1975) studied as part of this research, 45 cases were charged as rape or attempted rape. Of these 45 cases, 10 resulted in convictions for rape or attempted rape and an additional 10 cases resulted in convictions for other felonies.

[3] See Harl Haas, "Rape—New Perspective and Approaches," *The Prosecutor*, 11 (1976), pp. 257–259.

[4] For a description and discussion of the police response to rape see *Forcible Rape: A Manual for Patrol Officers; Forcible Rape: A Manual for the Investigator;* and *Forcible Rape: Police Administrative and Policy Issues*; published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, as part of this project; and Lisa Brodyaga, et al., *Rape and Its Victims: A Report for Citizens, Health Facilities and Criminal Justice Agencies*, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration (1975).

[5] For a general discussion of the response to rape by medical facilities, see Lisa Brodyaga, et al., infra, pp. 55–86.

[6] Ibid., pp. 123–136.

[7] For a comprehensive review and analysis of legislative change with regard to rape, see *Forcible Rape: An Analysis of Legal Issues*, published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, as part of this project.

[8] See Harry Kalvin and Hans Zeisel, *The American Jury* (Chicago: University of Chicago Press, 1966), pp. 249–254.

CHAPTER 2. RAPE AND ITS VICTIMS

It is unlikely that a prosecutor will become involved with many rape cases in his entire career. The policy maker in the prosecutor's office may not have tried a rape case for several years and may no longer interact personally with rape victims. In addition, prosecutors are subject to the same myths and media presentations, personal biases, and experiences that influence everyone's perception of what is rape and who are its victims. The purpose of this chapter is to inform prosecutors about rape and to replace stereotypes with more factual portrayals. By appreciating the nature of the rape victim's trauma, the prosecutor may be better prepared to formulate policy which will facilitate communication and cooperation with her. By understanding both the facts and the myths of rape, the prosecutor may be better able to judge his office's performance with respect to rape prosecution. Office policy that purports to prosecute rape aggressively may be insensitive to the emotional needs of rape victims and may weed out, through filing and plea bargaining, all but those few cases which correspond to antiquated notions of this crime.

2.1 The Incidence of Rape

Rape may be the fastest growing violent crime. In 1975, there was an estimated total of 56,090 forcible rapes reported in the United States, representing an increase of 48 percent from 1970.[1] Victimization studies have shown that rape is probably one of the most underreported of all major crimes as well. Estimates of the ratio of reported to unreported rapes range from one in three to one in five.[2] If the actual number of rapes is four times the reported number, almost one quarter million rapes were committed in 1975. If that number is correct, one in every 500 women in the United States was sexually assaulted in 1975.[3]

The incidence of reported rape is unevenly distributed. The Southern states recorded 31 percent of the total volume of reported rape in 1975 while the North Central and Western states each reported 25 percent and the Northeastern states, 19 percent. The metropolitan areas experienced the highest rate, 61 victims per 100,000 females. Cities outside of metropolitan areas reported a rate of 25 per 100,000 females while the rate in rural areas was 23 victims per 100,000 females. Victimization rates, when analyzed geographically, indicated that females in the Western states were victims of forcible rape at the rate of 73 per 100,000. In the South, this rate was 50 per 100,000; in the North Central states 47 per 100,000; and in the Northeast 41 per 100,000. There are no data available to suggest how the nonreporting rate corresponded to geographic sectors or demographic factors.[4]

As part of this study, 1,261 police reports from five metropolitan police departments and 146 victims interviews from three cities were analyzed in detail. The following patterns emerged from this research.

a. *Victims*. The victims of rape were usually young and single. Police reports indicate that over half of the victims were 20 years of age or younger. Another quarter to one-third of the victims were under 25 years of age, while less than 15 percent of the rape reports were received from women over the age of 30. Although women of all racial groups reported rapes, black women were slightly overrepresented when compared to their numbers in the general population.

b. *Offenders*. Most offenders were estimated to be in their twenties and, on the average, four to five years older than their victims. In general, racial minorities tended to be overrepresented in the offender population. In areas where the minority population is relatively small, the number of minority offenders identified by reporting victims was four or five times greater than their representation in the population as a whole. There was nothing particularly unusual about the physical characteristics of offenders. The majority of victims described their assailants as average in terms of height and weight. In approximately 60 percent of the cases reported to the police, the rapist was a complete stranger to the victim. In another quarter of the reported cases, the victim was acquainted with the offender or had a limited social interaction with him. The remaining 10 to 15 percent considered the offender a close friend or relative.

c. *Initial contact*. The two most common places victims reported encountering their assailants were in their own homes and on the street. In approximately one-half of the cases under review the victims reported that force was used against them immediately. In an additional third of these offenses, the victims reported being with the accused for less than 60 minutes when the assault occurred. Hitchhiking was involved in less than 15 percent of the rapes reported to the police.

d. *Weapons, force, and threats*. Weapons were used in approximately 50 percent of the reported rapes. Knives or guns were most widely employed, but such items as bottles, rocks, and lighted cigarettes were also used as weapons. In 75 percent of the rape reports, some

type of strong-arm force was used against the victim. Most of these victims reported being overpowered and held down, but choking and beating were not uncommon. In addition, some type of verbal threat was used against 60 percent of all reporting victims. These threats were usually made against the life of the victim.

e. *Resistance*. Although approximately one-third of all victims reported that they were unable to employ any type of resistance whatsoever, most women reported offering some type of physical, verbal or other form of passive resistance. Victims reported fighting with their assailants in roughly one-half of all cases. Approximately one-third of these victims reported that their resistance had no apparent effect on their assailants; most of them reported that their physical resistance caused the accused to become more violent and aggressive.

f. *Injuries*. About one-half of the women who reported being raped sustained physical injuries of some type. When injuries occurred, they usually consisted of minor cuts, scratches, and bruises. Few victims were seriously injured. Of the women who were injured, one-half reported that their resistance was the cause of the injury. Fully 80 percent of all victims believed that resistance would result in injuries.

g. *Additional crimes*. About half of the women who reported being raped also reported being the victim of additional offenses, including other sex crimes. About 25 percent were kidnapped or otherwise abducted. Theft was involved in 20 percent of rape reports. About 30 percent of the victims were forced to commit fellatio, and cunnilingus and anal intercourse were reported by about 10 percent of victims. Victims reported being forced to commit multiple acts of vaginal intercourse in approximately 25 percent of all cases.

2.2 Social Attitudes About Rape

Discussions of forcible rape are often replete with hearsay information, party humor, and fictionalized accounts drawn from novels, television, or movies. Thus it is not surprising that many incorrect assumptions and attitudes have been formulated about why and how rape occurs. For prosecutors, knowledge of these myths is helpful not only to assess their own attitudes, but also to explore the unstated assumptions of their office's policy toward rape.

A woman cannot be raped. One myth about rape suggests that commission of this crime is virtually impossible unless a woman wills it to happen. This attitude is crudely reflected in jokes about rape: "Have you ever tried to thread a moving needle?" or "A woman can run faster with her dress up than a man can with his pants down." Some believe that "no" to a sexual advance actually means "yes," and it has even been theorized that secretly or unconsciously women long to be raped. A practical corollary to these notions is that unless there are signs of resistance such as visible injuries, the victim must have wanted the "rape" to occur.

The fallacy of this myth can be exposed in a number of ways. First, in approximately one-half of all rapes, the victim is threatened with a weapon. She is thus unlikely to resist or to exhibit indicia of the rapist's force. Second, most women do resist in *some* manner. Perhaps because most women's experience and expertise with violence tends to be minimal, they are unlikely to engage in physical combat or succeed when they do. Many women employ what is referred to as "passive resistance." This can include crying, being slow to respond, feigning an inability to understand instructions or telling the rapist that they are pregnant, diseased or injured.[5] While these techniques may not always be successful, their use does suggest that the victim is surely not a willing partner. Finally, for a small percentage of victims, the assault occurs so suddenly and the resulting fear is so overwhelming, that they virtually "blank out" or become immobilized. With this type of response, referred to as "traumatic psychological infantalism" or "frozen fright," the victim not only is likely to submit, but also may give the paradoxical impression that she is friendly and cooperative.[6] Thus there is no simple relationship between resistance or injury and a willingness to be "raped." The range of violence and threatened violence employed by the rapist and the variety of victims and victim responses are too diverse to conclude that women can either easily avoid rape or secretly desire it.

Women "cry rape." It is often suggested that a high percentage of reported rapes is fabricated. It is alleged, for example, that many women "cry rape" to seek revenge, to explain a pregnancy or to hide an illicit affair. The number of rape reports which are actually falsified is difficult to assess. The estimates of police officers who were surveyed about the number of false accusations ranged from 0 percent to 96 percent of all reports. On a national average, 15 percent of all forcible rapes reported to the police were "determined by investigation" to be unfounded.[7] Given the inherent skepticism of many criminal justice personnel to rape victims and the harrassment and invasion of privacy that a reporting victim is likely to confront, it is doubtful that many false accusations proceed past the initial report. Curtis (1974) asserts that "contrary to widespread opinion, there is in fact little hard empirical evidence that victims in rape lie more than, say, victims in robbery."[8] Undoubtedly, there are false reports. However, the danger posed by the myth that women "cry rape" is that police

officers and prosecutors will believe it and then place the burden on the victim to prove the contrary.

The woman precipitated the attack. There is another popular conception that the victim actually provoked the rapist by her suggestive clothing or actions. She is thus "contributorily negligent," and as a result the rapist is somehow less culpable. Rape victims who were interviewed often described their own clothing at the time of the rape as unattractive and unseductive; many, in fact, wore blue jeans and heavy sweaters. Convicted rapists who were interviewed suggested that the victim's clothing had some influence on their choice of a victim, but it did not precipitate the rape. The rapists stated that the rape was planned in advance, and that the victim's clothing was perhaps one factor considered in the selection of the victim.[9] An analogous argument is made concerning the rape victim who was hitchhiking or had been drinking in a tavern prior to the rape. The myth sees these actions as being either those of a "loose woman" or those of a careless person who may be asking for trouble. The criminal law, of course, does not view the victim's actions in these cases as contributing to the crime. The police and the prosecutor must therefore distinguish between victim behavior emanating from poor judgment, naievete or independence and the obvious criminal acts of the defendant.

Myths about the rapist. It is a commonly held belief that a rapist is a sex-crazed maniac who has no normal sexual outlets. Recent research suggests, however, that rapists do not differ significantly on psychological tests from the average male, though there is a tendency to express more anger. In contrast to the rapist, other sex offenders (molesters, exhibitionists, etc.) differ significantly from the average male. Other studies report that most convicted rapists have a willing partner (a wife or girlfriend) with whom they are sexually active.[10] A related myth suggests that rape is a crime of sexual impulsiveness and that once a male is aroused, there can be no turning back. Research indicates, however, that between 60 and 70 percent of all rapes are planned in advance. The majority of rapists watch for a likely victim and then approach her with rape in mind.

2.3 Rape Trauma Syndrome

Some experiences or situations in life are considered crisis-inducing for any person who experiences them. Rape is one such experience. The psychological reactions of a woman who has been raped are similar to the emotional reactions that people experience in other types of crises such as severe automobile accidents, accidental death of a loved one, or serious physical injury. Normal patterns of living are temporarily disrupted by these events, and mechanisms to deal with stress are severely taxed. Certain reactions to such crises can be expected and should be considered a healthy response.

Researchers and medical personnel have interviewed victims of rape immediately after the attack and for a period of weeks and months thereafter. They have observed a common sequential pattern of emotional reactions that have come to be known as the "rape trauma syndrome." All rape victims do not follow the identical pattern of response, or experience the same symptoms or similar symptoms with the same intensity. Virtually all victims, however, experience some of the emotions described and the rape trauma syndrome therefore provides a useful means to discuss the general reaction of victims to the crisis of rape. The rape trauma syndrome describes three phases of psychological response: (1) the acute phase, (2) the adjustment phase, and (3) the integration phase.[12]

Acute phase. For the first several days following their rape, many victims experience extreme psychological reactions. Frequently, victims enter a state of emotional shock. They cannot believe the rape occurred and they may be unable to comprehend what has happened or what they should do. As a result, some victims act in what appears to be an illogical or irrational manner. For example, victims may not contact the police for hours or days, or they may repeatedly bathe or wash their clothes.

Every victim experiences some degree of abject fear. The forcible rape itself is most commonly perceived as a life-threatening event rather than a sexual intrusion. Often the victim's life is explicitly threatened. In addition, because weapons are often used, the victim fears injury, mutilation or permanent bodily damage. It is this fear that may determine and explain many of her actions during the hours and days immediately after the rape.

In addition to fear, victims are likely to experience a variety of other reactions, such as anger, shame, guilt, helplessness, anxiety, revenge, powerlessness, humiliation, and embarrassment. It is common for victims to experience severe and abrupt mood changes immediately after the rape. For example, during an interview, a victim might unexpectedly display a surge of anger followed by a sudden expression of guilt or self-blame. Such mood changes can be as surprising and unexpected to the victim as they are to the interviewer.

Rather than expressing their emotions, some victims respond to a rape with a calm, composed demeanor or "controlled reaction."[13] These victims do not wish to exhibit emotions, especially in front of a stranger or authority figure like the prosecutor. Psychologically, it is important for these victims to demonstrate that they can handle stress in a mature and adult manner. The appearance of casualness hides and may avoid true and often intense emotions. This "control" may result in victim responses which are considered inappropriate, such as

giggling, smiling or even laughing. Unfortunately, this type of response can cause others to doubt the victim's account of the rape.

Victims experience these feelings at different times and in different ways, depending on the manner in which they normally cope with crisis. Strategies will be affected by such factors as the victim's age and maturity, her upbringing (how she was taught to deal with crises), resources within her environment (how those close to her will respond), and her financial security. The victim's reaction to the rape is a complex interaction of the imposed situational crisis and the victim's own personal lifestyle.

Adjustment phase. Following their intense emotional reaction to the rape, victims often give every appearance of having learned to cope with their experience. Very often they accomplish this by blocking out all thoughts regarding their rape and rearranging their daily life so that they are not reminded of it. During this period some victims indicate they wish to withdraw their complaints or become uncooperative with investigators and prosecutors. This denial period is usually a temporary stage of outward adjustment, for at this time many victims have not fully come to terms with their experience. For these victims, fundamental problems may remain, only to emerge at a later time.

Integration phase. The final stage of dealing with rape trauma occurs over a long period of time and requires the victim to fully integrate her experience into her life as a whole. Because it so dramatically upsets the normal routines of a victim's life, a rape can produce a period of self-evaluation and new decisions. Many facets of the victim's life may be different after the rape. Some women find it necessary to change residences in an effort to achieve a feeling of safety. Such behavior is particularly common when women have been raped in their own homes. Other women spend a great deal of time, energy, and money to secure their present homes with new locks, bolts, or alarm systems.

Victims may perceive themselves as being changed by the rape, either because they feel differently about themselves or because they believe that others see them as changed and stigmatized. Many victims find it difficult to return to their normal responsibilities at work or school. If they do return, they are often unable to concentrate or carry out their normal tasks. For some victims this means either a decision to quit work or school or a decision by an employer to release the woman. In such instances, the woman's life is further disrupted by the lack of employment and financial security.

Family support can be crucial at this time. Unfortunately, family members can respond in ways that are not helpful to the victim. Victims describe husbands, boyfriends, and parents who doubt their account of the rape. Victims regularly report that their relationship with their husband or boyfriend is strained during the time immediately after the rape. Most victims severely limit their outside social activities for extended periods of time.

The victim and the criminal justice system. The effects of the rape trauma syndrome can influence the victim's interaction with the criminal justice system. There are many specific ways in which the victim's emotional defense mechanisms can interfere with the standard procedures for investigating and prosecuting rape cases. By being aware of such potential difficulties, criminal justice personnel at all levels can help victims resolve crises as they arise. Careful attention from the criminal justice system can prevent victim withdrawal and increase the likelihood of successful prosecution.

The victim who gives a statement to the police or the prosecutor shortly after the rape may be unable to relate the incident fully and accurately. Though ability varies among victims, all statements should be taken and later read with a consideration of the victim's emotional state at the time. It may be appropriate either to tape the victim's statement to capture the emotional quality of her voice, or to wait a period of time before any formal statement is taken. The emotional factor is not only critical for criminal justice personnel to consider at the time of statement taking, but it can be important later in explaining to juries the particular content of such statements.

Following their assault, some victims revert to a state of dependence or helplessness. Since decision making may become an ordeal, these victims can become extremely susceptible to pressure. A relative or friend with a strong opinion as to whether the victim should prosecute the rapist may be particularly influential. Victims also become very sensitive to the attitudes and behavior of authority figures such as patrol officers, investigators, and prosecutors involved with their cases. Lack of support from criminal justice personnel is likely to cause victims to become confused and uncooperative.

Victims often respond to the rape with a significant amount of guilt. Some victims exaggerate their own responsibility for not avoiding a potentially dangerous situation. This feeling is often reinforced when the victim is questioned about her inability to resist successfully or to escape. The victim may need some help to understand that hindsight always enables one to make better judgments. With proper emotional support, the majority of victims can eventually come to understand that they probably did the best they could under circumstances of potentially great personal danger.

Victims often report significant disruptions in their daily routines. Some women, for example, are unable to sleep at night and are easily awakened by noises that

would not normally bother them. Frequently, women also report loss of appetite. Others find that eating causes nausea, especially if they were forced to perform oral sex. The victim's ability to concentrate may be greatly diminished and her attention span temporarily shortened. In general, the victim's ability to perform normally may be severely altered, particularly as she is exposed to the further stresses of criminal justice procedures.

Nightmares are a common experience for women who have been raped. The dreams often consist of vivid pictures in which the victim relives the terror of the rape situation. The paralyzing feeling of doom is recreated with such reality that the victim often awakens to the same frightening powerlessness, loss of autonomy, and life-threatening fear of the rape itself. These dreams act to reinforce the victim's anxiety that she is no longer able to protect herself and may induce her to request her case be dropped.

Women who have been raped sometimes experience phobic reactions to circumstances or characteristics that they relate to their assault. For example, a victim who was raped on a stairwell may subsequently find it very difficult to use any stairs. Police and prosecutors should be aware of such phobic reactions, particularly if the victim is asked to return to the scene of the crime or to view evidence from the rape.

Phobic reactions and recurring nightmares are natural methods for coping with severe trauma. Rape victims, however, may be very worried that they are going crazy, that they can no longer cope, or that they will never be normal again. It is important that victims be able to talk to someone about these fears. Police and prosecutors can help by sharing their knowledge about the reactions that victims normally experience. By demonstrating sensitivity and concern, police officers and prosecutors can increase a victim's ability to recover quickly from the trauma of being raped and facilitate the investigation and prosecution of her case.

2.4 Policy Implications for the Prosecutor

Research has clearly indicated that the crime of rape often severely affects victims and their interactions with the criminal justice system. Rape victims are unlikely to report, communicate comfortably with law enforcement personnel, or remain involved with the criminal process unless police and prosecutors understand and respond appropriately to their needs. Therefore, prosecutors must devise policies and strategies to deal with this trauma, if only to insure that criminal cases can be effectively prosecuted. The prosecutor administrator should be confident, for example, that filing and plea bargaining deputies are aware of potential victim problems. Such awareness provides for better understanding and more effective development of the rape case, as well as reinforcing the necessity to keep the victim involved. The prosecutor administrator might also consider the direct provision of victim services, liaison with existing crisis centers, or structural changes within the prosecutor's office to insure continuing victim contact with a single prosecutor.

The factual patterns of reported forcible rape cases also have significant implications for the prosecutor in terms of filing and plea bargaining policy. Less than half of all rape victims receive any injuries, and most rapes occur in the darkness of night without witnesses. Furthermore, juries are often harsh critics of rape victims. Thus, prosecutors face the inevitable problem that rape cases are difficult to win. Every prosecutor acknowledges the seriousness of rape and can point to vigorously prosecuted cases in which the victim had been abducted and brutally beaten. Most reported rapes, however, do not have the dramatic features that tend to insure conviction at trial. The prosecutor must decide how resources can be expended for intensive rape investigation and trial preparation in order to increase the possibility of conviction. The prosecutor must also decide what risk of loss he will be willing to tolerate in order to obtain rape convictions at trial. These are difficult issues that may necessitate costly programs or force a concentration on rape cases at the expense of others. The remainder of this document explores some of these policy alternatives so that the prosecutor will be better equipped to make these judgments.

NOTES

[1] Federal Bureau of Investigation, *Uniform Crime Reports for the United States*, (Washington, D.C.: United States Government Printing Office, 1975), p. 22.

[2] In 1965, the National Opinion Research Center of the University of Chicago conducted a victimization survey and found that the actual rate of forcible rape in their sample was 3.66 times greater than the reported rate. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: United States Government Printing Office, 1967), p. 21. In California it has been estimated that the rate of actual forcible rapes to reported rapes was 1:5. State of California, Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Process, Preliminary Report 26 (1950). Police in Minnesota estimate the rate to be 1:4. Minnesota Department of Corrections, *The Sex Offender in Minnesota*, 2 (1964).

[3] *The Uniform Crime Reports* indicate that the national risk rate based on the figure of 56,090 rapes was 51 out of 100,000 females in 1975 (p. 22). When multiplied by four this becomes a rate of approximately 1:500.

[4] Ibid., p. 22.

[6] Martin Symonds, "The Rape Victim: Psychological Patterns of Response," *The American Journal of Psychoanalysis*, 36 (Spring, 1976), p. 32.

[7] Ibid., p. 30.

[8] The Uniform Crime Reports, infra., p. 24.

[9] Lynn A. Curtis, "Victim Precipitation and Violent Crime," *Social Problems*, 21 (1974), p. 601.

[10] Duncan Chappell and Jennifer James, "Victim Selection and Apprehension from the Rapist's Perspective: A Preliminary Investigation," unpublished paper presented at the 2nd International Symposium on Victimology, Boston, Massachusetts, September 8, 1976.

[11] See Richard T. Rada and Robert Kellner, "Plasmic Testosterone Levels in the Rapist", *Psychosomatic Medicine*, 38 (1976), pp. 257–268; Asher R. Pacht and James E. Crowden, "An Exploratory Study of Five Hundred Sex Offenders," *Criminal Justice and Behavior*, 1 (1974), pp. 13–20; Murray L. Cohen, et al., "The Psychology of Rapists," *Seminars in Psychiatry*, 3 (August, 1971) pp. 307–327; Walter Bromberg and Elizabeth Coyle, "Rape: A Compulsion to Destroy," *Medical Insight*, 22 (April, 1974), pp. 21–25.

[12] Chappell and James, infra.

[13] For a thorough description of this pathology, see Ann W. Burgess and Lynda L. Holmstrom, "Rape Trauma Syndrome," *American Journal of Psychiatry*, 131 (September 1974), pp. 981–986; Ann Burgess and Lynda Holmstrom, "Assessing Trauma in the Rape Victim," *American Journal of Nursing*, 75 (1975), pp. 1288–1291; Ann W. Burgess and Lynda Lyttle Holmstrom, "Coping Behavior of the Rape Victim," *American Journal of Psychiatry*, 133 (1976), pp. 413–418; Sharon L. McCombie, "Characteristics of Rape Victims Seen in Crisis Intervention," *Smith College Studies in Social Work*, 46 (1976), pp. 137–158; Malkah T. Notman and Carol C. Nadelson, "The Rape Victim: Psychodynamic Considerations," *American Journal of Psychiatry*, 133 (1976), pp. 408–413; Sandra Sutherland and Donald Schere, "Patterns of Response Among Victims of Rape," *American Journal of Orthopsychiatry*, 40 (1970), pp. 503–511; Martin Symonds, "The Rape Victim: Psychological Patterns of Response," *American Journal of Psychoanalysis* 36 (Spring, 1976), pp. 27–34.

[14] See Symonds, infra, p. 30.

CHAPTER 3. VICTIM SERVICES

While prosecutors should be trained to interview rape victims effectively and to recognize symptoms that might require referral to mental health professionals, it is probably inappropriate for individual prosecutors to engage in extensive crisis intervention or counseling services. However, since such services are often important to the victim's emotional health and the state's ability to pursue prosecution, prosecutors have explored ways to provide them. Their goals have been to facilitate attention to the victim's needs, strengthen her ability to testify, and reinforce her interest in prosecution.

3.1 Providing Victim Services

At least three different models of victim support have emerged. In the first model, general assistance is provided by small service agencies located within the prosecutor's office. The range of services provided varies, but often includes professional counseling, companionship during the court process, transportation to and from court-related appointments, and providing information about the victim's case as well as the criminal process generally.[1]

Another major concern of these agencies is to improve "witness management." The range of techniques and strategies employed includes centralization of witness notification, advocacy for increased witness fees, and the verification of witness addresses through the use of paralegals. With such improvements, witnesses need not endure the long hours of waiting until their cases are called. Generally, such management efforts encourage victims and witnesses to remain involved with prosecution and thus increase the possibility of obtaining convictions.

Though these witness assistance programs do focus attention on the problems of victims and witnesses, their major goal appears to be the improvement of general caseload management. Within these programs, rape victims are simply part of a larger population of victims and witnesses. Rape victims with special needs are referred to other community resources.

In a second model of victim support, prosecutors focus directly on the needs of rape victims by providing specially trained rape victim counselors or advocates within the prosecutor's office. In some offices, advocates are on 24-hour call and proceed to local hospitals to meet rape victims whenever a rape is reported. Thus a representative from the prosecutor's office becomes involved in a case before any decision is made with regard to the filing of criminal charges. In other offices, the victim advocate makes contact with the rape victim only after a criminal case has been filed.[2]

In either situation, the victim advocate is a professional, experienced counselor who helps the victim handle the immediate impact of the rape and provides continuing support if the victim becomes involved with prosecution. The counselor may help the victim arrange transportation to and from court, accompany her while she prepares for and awaits her testimony, and attempt to assist in related crises such as loss of employment or the need to change residences.

These advocates, by virtue of their placement within the prosecutor's office, often work closely with the attorneys assigned to the victim's case. They can act as a liaison between the prosecutor and the victim and assist the prosecutor in assessing the strengths and weaknesses of the case, communicating with the victim and keeping her informed. The advocate's intense involvement with the victim often frees the prosecutor to concentrate on the technical aspects of preparing and presenting the criminal case.

Most prosecutor offices cannot afford or prefer not to integrate the provision of direct victim services with the job of prosecuting. These offices rely on community resources to provide victim assistance and often work closely with rape crisis centers and outpatient hospital clinics.[3] However, there is often an arms-length, sometimes adversary, relationship between independent service groups and the prosecutor's office. Most crisis centers are staffed primarily with advocates who become involved with the criminal justice system only when it affects the interests of the victim. In fact, many crisis centers have been created as a response to the system's traditionally poor treatment of rape victims. Since their primary mission is victim advocacy and not criminal prosecution, these groups are sometimes critical of a prosecutor's filing and plea bargaining decisions.

In many jurisdictions, where there is cooperation between the prosecutor's office and local crisis centers, services are provided which benefit both rape victims and the prosecutor. Through the exchange of speakers, combined training programs, and more general communication, prosecutors and victim advocates have learned to appreciate the legitimacy of their respective roles. Prosecutors have begun to serve on the boards of local crisis centers and have testified on behalf of such groups during their seemingly endless financial struggles. Cooperation

can be further enhanced if a representative from the prosecutor's office attends regular crisis center meetings, if there is a permanent contact within the prosecutor's office, and if the advocate's views are solicited regarding criminal justice procedures and victim treatment. For most prosecuting agencies, local crisis centers provide the only practical means of extending services to victims. The more involvement the prosecutor has with the agency, the more professional it may become. A mutual concern for victim care and aggressive prosecution can provide the foundation for such cooperation.

Police agencies may also serve as a source of victim assistance. The community relations departments of some police departments already extend the same kinds of victim services to rape victims that prosecutor offices and private crisis centers provide.[4] Since so much of the police function is already service oriented, it may be appropriate for such agencies to institutionalize the provision of such services. The problem for police departments as well as prosecutor offices, however, is one of funding.

The prosecutor administrator who is concerned about the availability of services for rape victims might attempt to bring together the various service agencies in the community. Representatives of the prosecutor's office, the rape crisis center, the police department, and local hospitals could cooperatively assess the needs and resources of the entire community. Such an integrated approach may serve to limit the duplication of services and ultimately provide better victim assistance in a cost-effective manner.[5]

3.2 Survey of Prosecutor Attitudes

The prosecutor respondents for this study were queried concerning their attitudes toward victim advocate involvement in rape cases. The pattern of responses suggests that when the relationship is cooperative, such involvement is of considerable benefit to the prosecutor. Prosecutors generally perceived that rape victims need a degree of attention, assistance, and reinforcement that the prosecutor is unable to provide given the constraints of his schedule, training, and role. The victim advocate not only can help the victim, but can assist the prosecutor as well. Prosecutors cited the following types of assistance: maintaining contact with the victim, keeping her informed, helping the prosecutor communicate with the victim, and acting as a "trouble shooter" whenever a victim problem arises. In addition, the advocate can assist the prosecutor in preparing the victim for trial, keeping her calm during the trial, and providing insights into the behavior and condition of the victim. Some prosecutors perceived the advocate as "keeping him honest" or forcing him to work harder on behalf of the victim.

Other prosecutors displayed a negative attitude toward victim advocate involvement. To these prosecutors, advocates represented still another complicating variable in a rape case; decisions had to be explained and even justified to someone who, when politically motivated or too emotionally involved, might respond with hostility. There was some criticism that victim advocates were improperly trained. They were insensitive, for example, to trial strategy or even provided incorrect information to the victim. Some prosecutors generally resented the intrusion of "nonprofessionals" into their cases.

Prosecutors in offices which provided their own victim services were most favorably inclined toward victim advocates. Advocates were perceived to be not adversaries, but loyal team members. Furthermore, the prosecutors had a better understanding of the training, selection, and role of these advocates and worked more closely with them.

Virtually all the prosecutors surveyed envisioned potential advantages to them from the active involvement of properly trained advocates. To some prosecutors, advocates assumed victim responsibilities with which they felt uncomfortable and for which they felt poorly prepared. For other prosecutors, advocates represented increased assistance in all aspects of the criminal prosecution. Ultimately the issue seemed to be how proper training and professionalism of victim advocates could be assured, not whether such services should be provided. Thus, the problem posed for the administrator or policy maker is twofold: how to establish a victim service capability that will benefit both the victim and the criminal process, and how to convince certain attorneys that such advocates, even if adversaries, can have an important and legitimate role in the prosecution of rape cases.

3.3 Potential Problems of Victim Advocacy

The increased provision of victim services raises potential problems that might be usefully addressed by prosecutor administrators at an early stage in their development. One such potential problem concerns the role of the advocate with regard to privilege, access to information, and general notions of privacy. A second, perhaps related problem, concerns the role of the lawyer who independently represents the interests of the victim within the criminal justice system.

Privacy. Since the rape victim often meets the rape advocate shortly after the crime and is encouraged to be open in a counseling relationship, it is possible that the advocate may become a *res gestae* or occurrence witness. It is even possible that the victim will confide to the advocate information that she did not and would not want to report to the police. In these situations the advocate

may be sought as a witness for either the state or the defense.

Usually the advocate will have no difficulty testifying on behalf of the state, but she may be loathe to violate a victim confidence in cross examination or if she is called as a defense witness. The implications of this problem are far-reaching. If the prosecutor seeks to encourage victim advocacy, he must create an environment in which privacy is respected. If, on the other hand, the court orders that the advocate must reveal to the defendant the content of conversations with the victim, the prosecutor must advocate compliance or the criminal case will be jeopardized. There are few obvious solutions to this problem. In the short run the prosecutor can encourage the advocate to candidly explain the possibility of disclosure to the victim. A long range plan may include legislation which would extend a communicative privilege to specified types of counselors. This legal change, however, might result in more formalized relations between prosecutors and advocates, for the privilege would pertain to both the prosecutor and the defense.

The daily work of victim advocates may raise questions regarding access to files and case materials. For the advocate to do her job effectively, she may require detailed information about the case, the victim, and even the defendant. The question arises whether she should have access to such information or how access can be controlled to ensure the privacy interests of the defendant and other parties. The situation may differ if the advocate is an employee of the prosecutor rather than a member of an independent crisis center. But in either case, access to information may raise difficult discovery and privacy issues.

Private counsel. There is some indication that more victims are seeking private legal representation. In Ohio, for example, legislation has been passed which allows private representation of the victim at the pretrial hearing to determine the admissibility of her prior sexual history.[6] In addition, more victims are seeking civil remedies in those cases where the defendant is not judgment proof.

Victim representation raises several issues that might be addressed by the prosecutor. The victim's attorney may seek access to information about the state's case. If the attorney is to be an effective advocate for the victim, he may require copies of witness statements, police reports and even rap sheets that normally are not subject to public scrutiny. Additionally, there are procedural problems that may arise if the attorney is allowed to participate in criminal court hearings. It is unclear, for example, what his role should be vis-à-vis the state, the defendant, and the court. While the prosecutor normally assumes the role of protecting the victim, it is clear that this role is limited by the prosecutor's other obligations to the state and to the defendant. Therefore, the victim's private counsel may become an adversary to the prosecutor, attempting to protect the interests of the victim with more vigor than does the state. Does the victim's attorney, for example, have standing to object to questions posed by the prosecutor? On the other hand, the victim's private counsel may significantly benefit the prosecutor. Aggressive representation by the victim's attorney could ease the prosecutor's burden when advocating both for the victim and for the state. The victim would have an additional supporter within the criminal justice system which might reinforce her commitment to prosecution. In addition, there would be another advocate to argue against intrusions on the victim's privacy by such devices as court ordered psychiatric examinations or polygraph tests. There is inadequate experience at the present time to indicate the significance of these issues or how they might be resolved. Nonetheless, the burgeoning of victim concern suggests that more problems in this area are likely.

3.4 Conclusion

One of the most dramatic manifestations of the public interest in rape has been the emergence of victim service programs throughout the country. While these programs have been largely privately organized and motivated by opposition to the traditional criminal justice systems, they have gained acceptance by both police and prosecutors. The recent placement of victim advocates within police departments and prosecutor offices clearly indicates the formal recognition of such services. It has become increasingly clear that such advocacy not only assists the victim through the crisis of rape, but can lend valuable assistance to the prosecutor as well. Prosecutor administrators should seriously review the availability and quality of such services in their jurisdictions and attempt to closely integrate such programs with the normal processes of criminal prosecution. Such services raise complex issues, touching on resource allocation, personnel, training and even long term implications of privilege. Policy makers should become actively involved in these programs if the delivery of services for the benefit of both victims and the criminal justice system is to be guaranteed.

NOTES

[1] For a general description of witness programs in prosecutor offices see Frank J. Cannavale, Jr. and William D. Falcon, *Improving Witness Cooperation*, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration (August, 1976). Three such witness programs are located in the prosecutor offices of: Multnomah County (Portland), Oregon; Marion County (Indianapolis), Indiana; King County (Seattle), Washington.

[2] For a general description of such a program see Harl Haas, "Rape: New Perspective and New Approaches," *The Prosecutor*, 11 (1976), pp. 357–359. Two such rape victim programs are located in the prosecutor offices of: Multnomah County (Portland), Oregon, and Alameda County (Oakland), California.

[3] For a general description and discussion of such community programs see Lisa Brodyaga, et al., *Rape and Its Victims: A Report for Citizens, Health Facilities and Criminal Justice Agencies*, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration (1975), pp. 119–153.

[4] The police department of Indianapolis, Indiana, is an example of a department that provides such victim services.

[5] See, e.g., The Montgomery County Chapter of the National Organization for Women, et al., "Report of Montgomery County Sexual Offenses Committee," Montgomery County, Maryland (1975); County Council of Prince George's County, "Report of the Task Force to Study the Treatment of The Victims of Sexual Assault," Prince George's County, Maryland (March, 1973).

[6] Ohio Am. Sub. S. B. 144, Section 2907.02(f). was signed into law by Governor James A. Rhodes on August 27, 1975, to be effective immediately.

CHAPTER 4. LEGAL REFORM

The recent public interest in the crime of rape has resulted in an extensive review and revision of existing rape laws. Since 1973 virtually every state has considered legislation that would alter the definition of the crime, limit the admissibility of certain evidence, or directly assist rape victims.[1] Spurred by well organized feminist lobbies, these bills have gained widespread support and have passed in many states with extraordinary speed. The results have been mixed. In Michigan, for example, prosecutors report that the new law is very complex and only dimly perceived by attorneys in the criminal justice system. In Maryland, the new law coincides with other law that is redundant and often conflicting. In Oregon, evidentiary exclusions in the new law are so restrictive that they occasionally endanger the state's case. Generally, however, these bills are believed to be long overdue in redressing an imbalance that protected the rape defendant at the expense of the rape victim.

This remarkable legislative activity is likely to continue. Many states have not yet passed new laws and those that have will likely review their efforts in light of appellate scrutiny and the experience of implementation. The purpose of this chapter is to briefly describe some of the major issues in this wave of legislative reform so that prosecutors can be better prepared to actively participate in this ongoing legislative process.

4.1 Definition

There have been attempts in many states to redefine rape in order to encompass a broader range of criminal conduct.[2] Traditionally rape has been defined in terms of vaginal penetration by a penis against the will of a female who was not the assailant's wife. Recent legislative enactments have altered this traditional definition in several ways:

- the intercourse need not be vaginal, but can be oral or anal;
- the penetration need not be by a penis, but can be accomplished by any object, including the tongue;
- the victim need not be female;
- the victim can be the assailant's wife.

For prosecutors there are at least two controversial implications of these changes in definition. First, the distinction between rape and sodomy has been eliminated. Under traditional law even consensual acts of sodomy were prohibited. While a defendant might be acquitted on a rape charge by arguing that the victim was a willing partner, this defense would not avail him if he was charged with sodomy. In those cases where rape and sodomy occurred, prosecutors sought to file under both statutes; if the jury followed the instructions and consent was the issue, then they would at least convict on the sodomy charge. Since consent is a defense to both sodomy and rape under the new statutes, the prosecutor has lost a useful tool to gain convictions.

Prosecutors have argued vigorously and for the most part successfully against eliminating the husband-wife exception to rape. Prosecutors believe generally that enforcement and prosecution would be extremely difficult since juries are often reluctant to convict husbands, and wives are often ambivalent about prosecution. In some states the issue has been compromised: the victim may prosecute if she has filed for divorce, or has been separated from her husband.

The efforts to redefine rape have also led to the separation of the crime into degrees based largely on their severity. The Michigan statute (see appendix to this chapter) has four degrees of what is called "criminal sexual conduct." Two of the degrees involve sexual penetration, while the other two involve only sexual contact or touching. The two sets of conduct are further distinguished by the existence of aggravating circumstances, such as the use of a weapon, excessive force, or the commission of another felony. Coincident with the separation of the crime into degrees is the creation of a penalty structure that reflects the relative seriousness of the new crimes.

The implications for the prosecutor of such a multitiered statute are significant. First, there are the practical problems that arise when the distinctions between degrees are ambiguous, or when in trying to clearly proscribe specific conduct either too much or too little is included in the definition. The solution to these problems can, in turn, result in an overly complex and unworkable statute. In addition, there are implications for the prosecutor in his filing and plea bargaining policies. Usually the lower degrees of the crime are lesser included charges of the higher degrees. This implies that if the prosecutor files at a high degree a jury will have the opportunity to reduce the charge at trial. Rather than the traditional choice of conviction for rape or acquittal, the jury may be more likely to convict for some related crime. This increases the prosecutor's chance of conviction at trial and, thereby, provides plea bargaining leverage. In addition, the new laws provide prosecutors with

plea bargaining flexibility; traditionally, they had been forced to find a different crime in order to reduce a rape charge. With degrees of rape, the prosecutor can reduce the degree without changing the crime's basic label or deprecating its seriousness.

However, this type of legislative structure can also increase the prosecutor's burden at trial, for he has to prove more elements to gain conviction. The prosecutor must specifically allege aggravating circumstances to establish the higher degrees of the crime and therefore must prove these elements beyond a reasonable doubt. The old statutes defined rape more simply, albeit more narrowly, with fewer elements to prove. On balance, prosecutors have welcomed the newly structured rape laws because of the flexibility they provide in filing and plea bargaining. The greatest complaints so far seem to concern their complexity.

4.2 Evidentiary Changes

The admissibility of the victim's sexual history at trial has been significantly curtailed in a number of states.[3] The restrictive statutes, however, have defined the exclusions in several ways. In some statutes, the evidence is excluded unless it is relevant to the issue of consent, while in other states it is excluded unless it is relevant to the issue of credibility. Still other state legislatures have left the issue entirely to the discretion of the trial judge, and the evidence is admissible if it is simply "relevant."

At least three problems have been perceived with these types of evidentiary provisions. First, some prosecutors and commentators believe that the most restrictive provisions are unconstitutional in light of the defendant's 6th Amendment right to confrontation. In most states, the statutes have not received full appellate review. Second, while some statutes specify exceptions to the restrictions, for example, when the evidence can explain the existence of pregnancy, semen, or disease, other statutes do not. In Oregon, for example, prosecutors complain that because this exception is not part of the law they cannot ask the victim if she had intercourse with anyone but the defendant without opening the door to extensive cross-examination. Finally, it is unclear in most states whether the victim's sexual activity *after* the rape, but before the trial, is controlled by the statutes. These and other issues will ultimately be resolved through legislative amendment and appellate review.

4.3 Other Changes

There has been a significant amount of less publicized legislative action that can be equally important to the prosecutor.[4] In some states, legislation has mandated counseling services, medical care, and compensation for rape victims. In Ohio, legal counsel is guaranteed to every victim during the pretrial hearing to determine the admissibility of her prior sexual history. A limited number of states, among them Alaska and Massachusetts, have considered provisions for the training of criminal justice personnel and the standardization of police and hospital procedures with regard to the crime of rape. In Minnesota, a statewide program of victim services and criminal justice training has been enacted. (See appendix to this chapter.)

4.4 Conclusion

It is impossible to fully discuss the contents and ramifications of the numerous legislative proposals designed to deal with problems of rape. The innovative and far-reaching character of bills already enacted suggests the range of possible legislative activity. It is clear that public interest has focused on rape to such an extent that state legislatures have responded. The prosecutor should not only be aware of the public debate, but be in a position to influence the dialogue as a representative both of the electorate and the criminal justice system, as well.

NOTES

[1] For a comprehensive review and analysis of legislative change with regard to rape, see *Forcible Rape: An Analysis of Legal Issues*, published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, as part of this project.

[2] Ibid., Chapter 2.

[3] Ibid., Chapter 3.

[4] Ibid., Chapter 4.

APPENDIX TO CHAPTER 4

A. MICHIGAN SEXUAL ASSAULT STATUTE

The People of the State of Michigan enact:

Section 1. Act No. 328 of the Public Acts of 1931, as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, is amended by adding sections 520a, 520b, 520c, 520d, 520e, 520f, 520g, 520h, 520i, 520j, 520k, and 5201 to read as follows:

Sec. 520a. As used in sections 520a to 5201:

(a) "Actor" means a person accused of criminal sexual conduct.

(b) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.

(c) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

(d) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

(e) "Physically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.

(f) "Personal injury" means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.

(g) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be constructed as being for the purpose of sexual arousal or gratification.

(h) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

(i) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f) (i) to (v).

(e) The actor is armed with a weapon or any other article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years.

Sec. 520c. (1) A person is guilty of criminal sexual

conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(c) Sexual contact occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in sections 520b(1) (f) (i) to (v).

(e) The actor is armed with a weapon or any other article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1) (f) (i) to (v).

(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.

Sec. 520d. (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is at least 13 years of age and under 16 years of age.

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1) (f) (i) to (v).

(c) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.

Sec. 520e. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if either of the following circumstances exists:

(a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1) (g) (i) to (iv).

(b) The actor knows or has reason to know that the victim is mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years, or by a fine of not more than $500.00, or both.

Sec. 520f. (1) If a person is convicted or a second or subsequent offense under section 520b, 520c, or 520d, the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years.

(2) For purposes of this section, an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under section 520b, 520c, or 520d or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense.

Sec. 520g. (1) Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than 10 years.

(2) Assault with intent to commit criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 5 years.

Sec. 520h. The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g.

Sec. 520i. A victim need not resist the actor in prosecution under sections 520b to 520g.

Sec. 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1) (a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order

an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1) (a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

Sec. 520k. Upon the request of the counsel or the victim or actor in a prosecution under sections 520b to 520g the magistrate before whom any person is brought on a charge of having committed an offense under sections 520b to 520g shall order that the names of the victim and actor and details of the alleged offense be suppressed until such time as the actor is arraigned on the information, the charge is dismissed, or the case is otherwise concluded, whichever occurs first.

Sec. 5201. A person does not commit sexual assault under this act if the victim is his or her legal spouse, unless the couple are living apart and one of them has filed for separate maintenance or divorce.

Section 2. All proceedings pending and all rights and liabilities existing, acquired, or incurred at the time this amendatory act takes effect are saved and may be consummated according to the law in force when they are commenced. This amendatory act shall not be construed to affect any prosecution pending or begun before the effective date of this amendatory act.

Section 3. Sections 85, 333, 336, 339, 340, 341, 342, and 520 of Act No. 328 of the Public Acts of 1931, being sections 750.85, 750.333, 750.336, 750.339, 750.340, 750.341, 750.342, and 750.520 of the Compiled Laws of 1970, and section 82 of chapter 7 of Act No. 175 of the Public Acts of 1927, being section 767.82 of the Compiled Laws of 1970, are repealed.

Section 4. This amendatory act shall take effect November 1, 1974.

B. MINNESOTA VICTIM ASSISTANCE STATUTE

CHAPTER 578—S.F. No. 3301
[Coded]

An act relating to crime and criminals; requiring the commissioner of corrections to develop a program to aid victims of sexual attacks.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. [241.51] CRIME AND CRIMINALS; SEXUAL ATTACK VICTIM; PROGRAM TO AID. Subdivision 1. The commissioner of corrections shall develop a community based, statewide program to aid victims of reported sexual attacks.

Subd. 2. As used in this act, a "sexual attack" means any nonconsensual act of rape, sodomy, or indecent liberties.

Subd. 3. The program developed by the commissioner of corrections may include, but not be limited to, provision of the following services:

(a) Voluntary counseling by trained personnel to begin as soon as possible after a sexual attack is reported. The counselor shall be of the same sex as the victim and shall, if requested, accompany the victim to the hospital and to other proceedings concerning the alleged attack, including police questioning, police investigation, and court proceedings. The counselor shall also inform the victim of hospital procedures, police and court procedures, the possibility of contracting veneral disease, the possibility of pregnancy, expected emotional reactions and any other relevant information; and shall make appropriate referrals for any assistance desired by the victim.

(b) Payment of all costs of any medical examinations and medical treatment which the victim may require as a result of the sexual attack if the victim is not otherwise reimbursed for these expenses or is ineligible to receive compensation under any other law of this state or of the United States.

Sec. 2. [241.52] POWERS OF COMMISSIONER. In addition to developing the statewide program, the commissioner of corrections may:

(a) Assist and encourage county attorneys to assign prosecuting attorneys trained in sensitivity and understanding of victims of sexual attacks;

(b) Assist the peace officers training board and municipal police forces to develop programs to provide peace officers training in sensitivity and understanding of victims of sexual attacks; and encourage the assignment of trained peace officers of the same sex as the victim to conduct all necessary questioning of the victim;

(c) Encourage hospital administrators to place a high priority on the expeditious treatment of victims of sexual attacks; and to retain personnel trained in sensitivity and understanding of victims of sexual attacks.

Sec. 3. [241.53] FUNDING; PILOT PROGRAMS. The commissioner of corrections shall seek funding from the governor's commission on crime prevention and control at the earliest possible date for purposes of this act. In addition, the commissioner of corrections shall seek and utilize all other available funding resources to establish pilot community programs to aid victims of sexual attacks before December 1, 1974.

Approved April 11, 1974.

CHAPTER 5. FILING THE CASE

Whether to file charges is perhaps the most important decision the prosecutor makes with regard to rape cases.[1] Analogous to the police decision to investigate the complaint, the decision to file marks the formal entry of the case into the criminal justice system. More importantly, the decision *not* to file essentially terminates the involvement of the criminal justice system with the crime. While decisions to file rape charges are highly visible and systematically reviewed through the adversary process, the decision not to file is virtually invisible and unreviewable. A decision to file is thus critical to the prosecution of rape cases.

Prosecutor decisions have generally been quite conservative at the time of filing and have been dominated by two perceived characteristics of rape cases. Prosecutors have been cautious because, first, it is believed that rape reports are often falsely made. Wigmore, the prominent legal commentator, has written about the psychological roots of such false reports:

> Modern psychiatrists have amply studied the behavior of young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offense by men.[2]

Prosecutors more commonly allege false reporting by unpaid prostitutes or the young complainant who must explain her promiscuity to a father or boyfriend. The legal system has reinforced this skepticism by requiring corroboration of the crime and special cautionary instructions to the jury, or by permitting extensive cross-examination of the victim.[3] To screen false reports that have passed police scrutiny, prosecutors have often insisted on personally interviewing the victim before filing or required that she take a polygraph examination.[4] Neither of these procedures is normally required in the filing of other crimes.

Second, prosecutors, even if they are satisfied with the complainant's veracity, have been cautious in the filing of rape cases because they are perceived to be so difficult to win. Caution has been exercised particularly in those states whose laws have erected procedural barriers to effective prosecution. In addition, the political need to maintain a high conviction rate has led prosecutors in some jurisdictions to file only those cases with a high probability of conviction.

It is impossible to accurately assess the validity of the prosecutor's concerns about rape cases. Not only are there no statistics available regarding the number of false complaints reported to the prosecutor, but these concerns become self-fulfilling prophecies. If the prosecutor does not believe the victim, the case is not filed and, therefore, cannot be won. If the prosecutor believes that the risk of losing is too great, for any number of reasons, the case is not filed and failure is assured.

An additional factor also can account for conservative attitudes at filing. The crime of rape involves sexual acts that in other situations are perfectly legal. There are many cases in which it is a question whether the sexual contact was done in a criminal or social context; and here the prosecutor's decision may be influenced by his own ideological view regarding the nature of rape. One prosecutor who was interviewed as part of this survey clearly distinguished between rape victims who were employed or who were housewives with families and rape victims who were unmarried and on welfare. It became clear from his statements and those of others that personal attitudes toward women, sexuality, race, and class may all affect the prosecutor's decision-making. While every prosecutor condemns rape as a heinous offense, not every prosecutor would agree on what constitutes a rape. This factor, combined with the fear of false reports and the need for probable convictions, has made filing judgments a central problem of rape prosecution.

Prosecutors have recently begun to reexamine some of their assumptions regarding rape cases. While everyone would concede that rape reports are occasionally falsified, many prosecutors have rejected Wigmore's philosophy. They no longer assume false reporting and no longer require extensive use of the polygraph and prefiling interviews. They conclude that it is unlikely that a woman would expose herself to the insensitivity of the criminal justice system to lodge a false complaint. While prosecutors still consider rape cases to be difficult to win, a new recognition of the seriousness of the crime has encouraged prosecutors to take greater risks at the filing stage. Attitudinal changes, coupled with legal changes such as the exclusion of prior sexual history evidence, have encouraged the filing of rape cases that previously would not have entered the system. The appropriate standard for filing now appears to be only whether there is a "reasonable possibility" of conviction.

The balance of this chapter explores the process of filing from the perspective of the policy maker or

administrator. It briefly discusses several issues including filing personnel, criteria for the filing of rape cases, consistency in filing, and the purpose of prefiling interviews with victims and of victim polygraph tests.

5.1 Filing Personnel

Prosecutors' offices screen cases in a variety of ways. In some offices the newest deputies are assigned to the task of reviewing cases before they are tested at the preliminary hearing or grand jury. In other offices, special filing units have been created in which experienced prosecutors file major cases or approve the preliminary decisions of less experienced deputies. In other jurisdictions filing is a less structured process in which detectives make informal contact with individual prosecutors to file cases.

To a significant extent rape cases pose special problems at the time of filing that require a special response by the prosecutor. First, since the available evidence in rape cases is often so limited, every potential piece of evidence must be considered and developed. If the prosecutor is inexperienced he may overlook possible evidence that can only be gathered at the time of filing. He may be unable to suggest additional investigative paths for the detective. Second, in most rape cases highly technical evidence involving medical examinations and microscopic and chemical analyses is becoming available routinely. The filing prosecutor must understand the potential use of such evidence and make sure that all relevant tests are performed. Third, due to often conservative jury attitudes toward this crime, an assessment of the case requires that the prosecutor understand the composition of local juries and their likely reaction to a specific fact situation. Finally, these cases involve victims who may be considerably shaken by the ordeal of rape. Significant skills in interviewing and at least a rudimentary knowledge of crisis intervention may be required to communicate with the victim and fully assess the strengths and weaknesses of the case.

As a first step in reviewing the filing process, the administrator might consider who is filing rape cases in his office and whether he is appropriately trained and experienced for this task. Most prosecutors surveyed suggested that the best filing deputy is one who has tried rape cases, for he can more readily imagine how a case will appear weeks or months later at trial. It is this imaginative ability that is probably the key to effective screening.

The policy maker must insure that his personnel receive appropriate training. While some attorneys may intuitively be good interviewers, capable of developing rapport with rape victims, most attorneys require training and experience to master these skills. Law schools generally do not address their curricula to these needs and most prosecutor's offices have only limited training programs. In Chapter 6, potential training models will be discussed to assist prosecutors in learning the legal and interpersonal skills required for effective prosecution of rape cases.

Experience, and even training, however, are not the only factors that dictate success at filing. As indicated previously, filing decisions in rape cases are especially subject to prosecutor bias toward rape, sexuality, and even race.[5] The experienced prosecutor who tries robbery or homicide cases with great skill may have special feelings regarding rape or may be uncomfortable or ineffective working with rape victims. Influencing filing as they do, such factors can determine which cases proceed through the system.

5.2 Consistency In Filing Decisions

Regardless of the expertise or best intentions of prosecutors, there is likely to be a divergence of opinion with regard to which cases should be filed and which cases should not. Any prosecutor's opinion may depend on his assessment of the case's strength or his attitude toward filing in general or rape in particular. Prosecutors interviewed as part of this study displayed a variety of philosophies regarding the filing of rape cases. Some prosecutors believed that because of their importance, rape cases should be filed even if they were weaker than other felony cases. They argued that such cases are inevitably weak, and that risks of acquittal at trial must be tolerated. Other prosecutors commented that since rape cases are so difficult to win at trial, they should only be filed if they were extremely strong. This would suggest a higher standard for rape cases than for other felonies. A majority of the prosecutors argued that the strength of the rape case should be equal to the strength of any other case to justify filing. This divergence of opinion suggests that individual prosecutors, even within the same office, may apply different criteria to the filing decision.

There are several possible approaches to assuring consistency in case filing. The number of prosecutors who actually make filing decisions could be limited so that individual diversity in filing criteria is decreased. Similarly, final approval of all filing decisions could be made by a single prosecutor after cases are subjected to a preliminary screening.

Prosecutor administrators can establish guidelines regarding rape prosecution so that prosecutors will have an office policy statement available to assist in their decision making. The administrator can clearly state in a policy manual that rape cases will be given special priority and that filing deputies should be aggressive in developing and filing these cases. Factors which the filing deputy should consider, for example, the seriousness of

the crime, the record of the defendant, and the attitude of the victim, could be articulated by the policy maker and listed in order of their priority. In addition, factors such as race and social class could be clearly noted as inappropriate for consideration. Whenever a filing deputy rejected a rape case he could be required to state his reasons in writing. These explanations could be reviewed periodically by the administrator to ascertain whether decisions were being made with consistency and if the intent of the office was being implemented. By commenting on which explanations justified rejection and which did not, the administrator would continuously promulgate and review standards of office policy. Guidance would thus be provided to filing prosecutors with regard to which cases are appropriate for prosecution.

5.3 Prefiling Interviews with Victims

In light of the victim's central role in prosecution, the question is often raised whether the victim should be personally interviewed by a filing prosecutor prior to the making of a filing decision. Some prosecutors insist on this procedure, while others never require such an interview. A third group of prosecutors suggests that interviews should be limited to special cases where particular aspects of the case require clarification. Given the time and resources required for such an interview and its impact upon the victim, administrators might consider formulating office policy with regard to this issue.

The decision whether to interview prior to filing is often not made on the merits of such a procedure, but on the traditions, resources, and structures of the criminal justice system in which it occurs. In some jurisdictions, scarcities of time or resources make it impossible for the prosecutor to interview every victim. He relies on police interviews and postpones meeting the victim until she testifies at the preliminary hearing or the grand jury. Since practices vary, a closer look at the perceived advantages and disadvantages of prefiling interviews is required.

Advantages of prefiling interviews. Prosecutors cited a number of advantages of prefiling interviews. Victim interviews provide prosecutors with an opportunity to grasp the details of the case and to follow up limited written statements with direct questions to the victim. They allow the prosecutor to meet the victim and learn more about her: what she is like, whether she can articulate her story and is convincing, how strong a witness she will be, how much work is required to prepare her for trial. Many prosecutors use the interview to decide whether the victim is telling the truth and whether she really wants to prosecute. For some, the personal interview provides an opportunity to explain the judicial process to the victim and reinforce her decision to prosecute. Through the interview, the prosecutor can portray himself as a personal representative of an otherwise bureaucratic system, allay the victim's fears, and answer her questions. Especially in those jurisdictions which require preliminary hearings for rape cases, prosecutors believe that it is important for the victim to be well prepared and assured of continued support.

Disadvantages of prefiling interviews. A number of disadvantages were also cited. Many prosecutors stated that the time required to conduct a prefiling interview was not worth the potential benefits. In addition, they questioned whether the victim should be required to tell her story several times, to police, hospital personnel, and prosecutors, during a short period of time after the rape. It was argued that the value of such an interview would pertain to virtually all felony cases, and that singling out sexual assaults only reinforced stereotypes regarding the unreliability of rape victims. Finally, prosecutors argued that it was better to carefully inform and prepare the victim just before the preliminary hearing or trial, rather than before the case is even filed.

Resolving the debate. The prefiling interview can serve several valuable purposes, but these may be accomplished in other ways. The screening of criminal cases may not require an interview if the police perform this function adequately. Support and information can be provided to the victim by trained and sensitive police personnel or victim advocates. The interview tends to reinforce the notion that the rape victim is someone whose veracity is inherently suspect. In addition, an interview at this stage may be complicated by the contradictory goals of reinforcing the victim and testing her credibility.

Where the fact situation seems atypical, or the victim requires special attention, a prefiling interview seems appropriate. The police or victim advocate might suggest the need for an interview in a particular case and the policy maker could devise guidelines to suggest in which types of cases such interviews would be advisable. However, the requirement of universal prefiling interviews in rape cases when they are not required for other felonies should be carefully reexamined. If the needs of the victim and the prosecutor can be served in other ways, the prosecutor should seriously question this expenditure of resources.

5.4 Prefiling Polygraph Examinations

The prefiling use of polygraphs for rape victims is a controversial issue that should be reviewed by policy makers. There is a significant division of opinion among prosecutors regarding the advisability of victim polygraph examinations during the filing process. While one prosecutor considered it "the next step from the Ouija board," others used it in 30 or 40 percent of their cases.

Those prosecutors who use the polygraph cited two

primary purposes. First, it allows them to decide who is telling the truth in difficult cases. Prosecutors frequently request in close cases that victims submit to polygraph examinations prior to any filing decision. Close cases include those in which the victim is a prostitute, the victim and the defendant knew each other prior to the rape, or the victim voluntarily accompanied the defendant to the scene of the crime. Second, many prosecutors use the polygraph to "test the will" of the victim. A victim who agrees to take the test is believed to be willing to have her story confirmed and to proceed with prosecution. The unstated corollary, of course, is that the victim who refuses is either not telling the truth or does not want to prosecute with sufficient resolve. It is assumed that this victim might reconsider prosecution when the case is ready for trial.

There is significant debate about the utility of the polygraph as an indicator of truthfulness. A recent House Committee on Government Operations report concluded that the reliability of the polygraph has not been established and so it should not be used by the Federal Government.[6] There are additional questions about the reliability of the polygraph in these types of cases. Where consent is a key issue, and the defendant believed the victim consented, the polygraph could suggest that both parties told the truth. This would not resolve the legal issues, though it would seriously damage the state's case. The prosecutors who were surveyed displayed their own lack of confidence in the polygraph when they were asked if they supported legislative change to allow the admission of test results at trial. The overwhelming majority of the respondents, including those who used polygraphs for pretrial screening, opposed its admissibility.

Use of the polygraph also has a significant indirect impact on the criminal justice system. Victims who take the polygraph examination and pass it provide prosecutors with an incentive to vigorously prosecute the case and resist extensive plea bargaining. A successful polygraph examination of the victim can be used to persuade the defendant and his attorney that a plea of guilty is appropriate. On the other hand, the act of requesting such a test is still another symbolic suggestion to the victim that she is not believed. Her refusal to take the examination may only reflect her reaction to the consistent doubt expressed by the criminal justice system and not in any way mean that she is fabricating her account or is ambivalent about prosecution. Furthermore, prosecutor reliance on the polygraph may suggest an unwillingness to make difficult decisions. The prosecutor must base his decision whether or not to file a case on his assessment of the sufficiency of the evidence; a polygraph cannot tell the prosecutor how strong his case is. Victim refusal to take a polygraph examination or inconclusive test results may merely provide the prosecutor with an excuse to decline the case.

There is no logical reason to use the polygraph to screen rape cases any more frequently than to screen other cases. Given the present uncertainty concerning its reliability and its potentially negative impact on the attitude of the victim, its use should be limited to cases where there are obvious factual discrepancies in the victim's statements or the defendant is willing to submit to a stipulated test.

5.5 Communication Among Prosecutors

Assuming that considerable resources are expended in the process of filing cases, it is important that the information gathered and opinions formed be recorded and therefore accessible to the subsequent decision makers in any particular case. To facilitate this goal, the prosecutor administrator should encourage the development of a standardized form to be used by filing deputies. The form could include a checklist enumerating those documents that should be in the file as well as a series of criteria to be considered in the filing process. Such a format would not only provide a means to transfer information from deputy to deputy, but would force consideration of the case along standard, predetermined lines. An example of such a filing checklist, adaptable to local practice, is included as an appendix to this chapter.

5.6 Conclusion

The filing of rape cases requires a basic ability to analyze facts and law as well as the imagination to picture the unfolding of a case during an eventual trial. These are skills that the trained and experienced prosecutor should have acquired. In addition, however, the filing process incorporates policies and attitudes which can be particularly important in rape cases. Filing must reflect an aggressive posture toward rape and a belief that this crime justifies the taking of risks and the commitment of resources. This philosophy must be articulated and reinforced by policy makers so that it can be implemented by every deputy who must decide whether a particular rape case should be filed.

NOTES

[1] For a general discussion of prosecutorial discretion in the filing of criminal charges see Frank W. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* (Boston: Little, Brown, and Co., 1969).

[2] John H. Wigmore, *Wigmore on Evidence* (Boston: Little, Brown and Co., 1934), Section 924a, p. 379.

[3] See *Forcible Rape: An Analysis of Legal Issues*, published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project, Chapter 3.

[4] The results of a nationwide survey of 150 prosecutors' offices can be found in *Forcible Rape: A National Survey of the Response by Prosecutors*, published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project.

[5] For an interesting discussion of how men and women perceive the crime of rape, see Shirley Feldman Summers and Karen Lindner, "Perceptions of Victims and Defendants in Criminal Assault Cases," *Criminal Justice and Behavior*, 3 (1976), pp. 135–150.

[6] See Committee of Government Operations, "The Use of Polygraphs and Similar Devices by Federal Agencies," H.R. Rep. No. 94–795, 94th Congress, 2d Session (1976).

APPENDIX TO CHAPTER 5
FILING CHECKLIST

Case #
Detective
Victim's name
Defendant's name
Date of offense
Date of prosecutor presentation
Name of prosecutor

1. Statements — Comments
   - ☐ a. Victim
   - ☐ b. Patrol Officer
   - ☐ c. Res Gestae witness
   - ☐ d. Defendant
   - ☐ e. Victim advocate
   - ☐ f. Transactional witnesses
   - ☐ g. Other witnesses
2. Reports
   - ☐ a. Initial report form
   - ☐ b. Follow-up reports
   - ☐ c. Medical examination
   - ☐ d. Forensic tests
   - ☐ e. Evidence sheet (physical evidence)
   - ☐ f. Cover sheet (names and addresses of all witnesses)
   - ☐ g. Copy of any search warrants
   - ☐ h. Defendant identification information
   - ☐ i. Rap sheets
   - ☐ j. Line-up identification forms
   - ☐ k. Advisal of rights forms
   - ☐ l. Other reports
3. Physical evidence
   - ☐ a. Clothing of victim
   - ☐ b. Clothing of defendant
   - ☐ c. Diagram of crime scene
   - ☐ d. Photograph of crime scene
   - ☐ e. Photograph of victim injuries
   - ☐ f. Other physical evidence

Case Analysis

A. Intercourse
   - ☐ 1. Medical evidence
   - ☐ 2. Forensic tests
   - ☐ 3. Defendent statement
   - ☐ 4. Victim statement

B. Identity
   - ☐ 1. Photo montage
   - ☐ 2. Lineup
   - ☐ 3. Defendant's statement
   - ☐ 4. Physical evidence
   - ☐ 5. Other witnesses
   - ☐ 6. Other evidence

C. Force, Lack of Consent
   - ☐ 1. Victim's statement
   - ☐ 2. Defendant's statement
   - ☐ 3. Weapons
   - ☐ 4. Evidence of injury
   - ☐ 5. Evidence of emotional trauma
   - ☐ 6. Torn or soiled clothing
   - ☐ 7. Circumstances of case
   - ☐ 8. Other evidence

Comments

Case Evaluation

1. Strength of the case
   a. Victim's credibility
   b. Corroborating evidence
   c. Legal problems
2. Who is the defendant
   a. Criminal record
   b. Suspect in other crimes
   c. Dangerousness
3. Seriousness of the crime
   a. Injuries
   b. Threats
   c. Victim reaction
4. Victim's attitude
   a. Willing to testify
   b. Anxious to proceed
5. Probability of winning at trial
   a. Percentage
   b.
6. Major weaknesses at trial
   a.
   b.
7. Major strengths at trial
   a.
   b.

Victim Support

- ☐ 1. Victim advocate
- ☐ 2. Information provided to victim
- ☐ 3. Referrals

Notes to Prelim Deputy

Notes to Trial Deputy

CHAPTER 6. PROSECUTING THE CASE

If a rape case is filed, it normally proceeds through the criminal process as does any other felony case. The stages usually are determination of probable cause, plea negotiation, trial, and sentencing. Given the particular characteristics of the rape victim and the inherent weaknesses of many rape cases, however, special problems occasionally arise. This chapter will briefly explore the important policy issues for prosecutors raised at each of these stages.

6.1 Determining Probable Cause

Probable cause is established by a variety of means throughout the country. There are both adversarial and nonadversarial preliminary hearings, grand juries, and direct filings where probable cause is established simply through the prosecutor's affidavit. The manner in which probable cause is established can have a substantial impact on the development and potential success of the case. This is especially true in rape cases where the victim is such a critical, but often vulnerable, witness. The extent to which the victim understands the pretrial process, whether she is prepared to testify under what might be adverse circumstances, and whether she is debriefed following her experience, may all affect not only the quality of her testimony, but whether she will continue to cooperate with the prosecutor at all.

The preliminary hearing. In those states which require adversarial preliminary hearings, the hearing is often an inexplicable and traumatic experience for the victim, especially the child victim. While a victim may have some familiarity with the tone of a trial, it is unlikely that she could anticipate the reality of the preliminary hearing. Especially in urban courtrooms, the preliminary hearings for rape cases appear in a calendar mixed with hearings for other felonies and even misdemeanors. The courtroom and halls are often crowded with witnesses, defendants, relatives or courthouse "regulars," who have come to participate in or observe hearings which involve drugs, robbery, homicide, and the like. The courtroom itself reflects the bureaucratic needs of the participants. The judge has a lengthy calendar to complete, as have the prosecutors. The defense attorneys impatiently await their turn; once they have an opportunity to speak, they are unwilling to relinquish it. The need to process cases often creates a tension in the courtroom that can be heard in the tone of the judge and attorneys. Witnesses are often rudely instructed to step up, sit down, speak up, answer the question. The victim is often called to the witness stand without having met the prosecutor who will be asking her questions, without having been prepared for her cross-examination, and without having seen the defendant since the moment of the rape. These conditions, while routine to the professionals, must seem chaotic to the parties.

When prosecutors were asked what they hoped to achieve through the preliminary hearing of rape cases, two distinct perceptions of the process emerged. Many prosecutors considered the preliminary hearing as an opportunity for the state to test and evaluate its case. The prosecutor could observe the victim respond to his questions and to cross-examination by the defense attorney. The victim's ability to articulate the events of the rape, recall specific details, and control her emotions under realistic conditions would become central to his assessment of the case. These prosecutors did very little preparation for the hearings and rarely met the victim before she testified. They assumed that many rape cases would be screened out of the system as a result of this process.

Other prosecutors viewed the preliminary hearing as a necessary evil whose purpose was to fulfill technical legal requirements. Perhaps, they argued, it had value in those rare situations where the victim would later be unavailable or where the defense strategy could be discovered. Generally, however, these prosecutors believed that little could be achieved and much would be jeopardized at the preliminary hearing. The hearing could only help the defense by exposing the state's case and creating a record for future impeachment. In addition, the hearing itself could upset and alienate the victim. The prosecutors argued that if filing were done properly, the hearing became a futile exercise.

From the administrator's perspective, preliminary hearings act to screen out cases. Cases are often routinely dismissed when witnesses do not appear. In addition, plea bargaining is facilitated by the public exposure of the case's strengths and weaknesses. Preliminary hearings represent a relatively inexpensive way to superficially present many cases; there is no expectation that cases will be fully developed or the needs of victims addressed. The problem, at least with rape cases, is that this exposure of the case, at probably its weakest moment, can seriously jeopardize its already limited potential for success at trial.

If rape cases are to be effectively prosecuted in jurisdictions where adversarial preliminary hearings are required, resources will have to be invested to properly

prepare both deputies and victims. To the extent that the victim testifies without preparation, the chances increase dramatically that she will create a record for her own impeachment. Her inability to remember details because she has not read her statements, her reluctance to be specific because she does not understand the purpose of the hearing, her nervousness because she does not like to talk about rape in a crowded courtroom, all accrue to the advantage of the defense. Only if the prosecutor has sufficient time to reinforce and prepare the victim for her testimony will the preliminary hearing not jeopardize the prosecution. The prosecutor-administrator should also consider working with court administrators to have all sexual assault cases heard on a single preliminary hearing calendar or at least at the end of a normal calendar. In jurisdictions where such accommodations have been made, hearings seem to be conducted with more respect for and sensitivity to the victims.[1]

Grand jury. The grand jury hearing allows the prosecutor to assess his case without exposing it to significant risk. He can more easily control the hearing while its nonadversarial nature shields and protects the victim. The investigative nature of the proceeding allows the prosecutor to explore more widely and to call a variety of witnesses who might be more reluctant to testify in an adversary setting. The courtroom is more relaxed, with grand jurors less harshly inquisitive than the defense attorney of the preliminary hearing. The very fact that the hearing is not public and the defendant is absent must lessen the strain on the rape victim. The prosecutor has the additional benefit of asking the jurors what questions or doubts they have, and what further evidence they would like to see developed before they would vote to convict. Thus, the grand jury hearing becomes a dry run, not only for the witnesses, but for the prosecutor as well.

It is true that the grand jury hearing is a less realistic model vis-à-vis the trial than the preliminary hearing. The true strength of the case may not be accurately assessed because it is not fully tested. This argument, of course, assumes the need and value of such testing. The jury itself acts as an independent evaluator of the case. Telling her story to a group of strangers in a courtroom may very adequately prepare the victim for the trial.

In general, the grand jury is a preferred means of establishing probable cause. The prosecutor can use the hearing to test his case without exposing it and the victim to the scrutiny of opposing counsel. This method can simultaneously lend support to the victim and fulfill the needs of the prosecutor.

Direct filing. The direct filing of rape cases, with probable cause established by the prosecutor's affidavit, provides the least exposure of the rape case and its victim. It provides, however, no test at all of the state's case. Where sufficient resources have been invested in the careful screening of rape cases, direct filing provides a valuable option for prosecutors. If the prosecutor has a choice of direct filing or a preliminary hearing, a carefully articulated policy should be developed which presumes direct filing unless there are specified reasons for a preliminary hearing test.

Conclusion. The impact of the preliminary hearing on both the victim and the state's case has not been given sufficient attention in many jurisdictions. To the extent that the process intimidates victims and weakens potential cases, the preliminary hearing acts as a device to remove cases from the system. While this may not be a conscious policy decision of prosecutors, the result is the same. The "test" of the case at the preliminary hearing is virtually predetermined by the resources expended in preparation and victim support; rape cases are predisposed to failure. If rape is to be effectively prosecuted, the critical impact of the preliminary hearing on this type of case must be carefully analyzed. Aggressive prosecution through case preparation, victim support, and attempts to limit and even bypass the preliminary hearing are necessary to counter the inevitable processes that will weaken rape cases. "Business as usual" at the preliminary hearing means that rape cases will be dismissed or reduced because victims will drop out or perform poorly. More time and care must be invested if rape cases are to be given an even chance at successful prosecution.

6.2 Plea Bargaining

Plea bargaining is an institutional reality of the criminal justice system that is justified by prosecutors because it is efficient, because it avoids the risks and trauma of trial, and because it allows them to exercise discretion in the interests of justice.[2] Plea bargaining has been subject to significant criticism, however, especially in the context of rape. It is often suggested, for example, that rape cases are reduced too routinely. Such bargaining is allegedly symptomatic of a timid stance with regard to rape, parochial attitudes toward women, or exaggerated fears of losing at trial. Victims, and even the police, complain that they are not consulted about plea negotiations and are only occasionally informed of an agreement after the fact. For the prosecutor administrator then, plea bargaining in rape cases constitutes at least a public relations problem, and at worst, represents a failure to perceive the nature of this crime.

In the process of plea negotiations, prosecutors make a series of decisions that reflect both traditional legal analyses and policy judgments. Many plea bargains involve consideration of the admissibility of seized evidence or confessions, the reluctance of witnesses to testify or the impression they make before juries. These evaluations require legal and trial skills developed through training, experience, and ability.

In addition, many plea decisions involve fundamental judgments that require the application of basic office policy. The prosecutor administrator must develop policy that can be applied by individual negotiators and, thus, establish the tone and aggressiveness of the office. There are many questions that must be addressed. For example, what risks and costs can be justified in the pursuit of a rape conviction? Should greater chances be taken at trial with rape cases than other felonies because the crime is so important? Or should there be more plea bargaining in these cases because they are so difficult to win at trial? Should the prosecutor distinguish rape cases by their seriousness at plea bargaining, or should the jury be allowed to decide whether a particular fact situation justifies a conviction for rape? The ultimate question is how "tough" should the office be on rape?

While these are obviously difficult questions to answer, the more fundamental problem is that these and similar questions are rarely even raised in the context of plea bargaining. Traditionally, cases are evaluated on an *ad hoc* basis with decisions emanating from virtually private discussions between individual prosecutors and defense attorneys. It is unclear what factors are considered, how they are weighed or how any individual decision fits into a more general pattern of office policy. There are virtually no written standards for plea bargaining in prosecutor offices and no structured means to ensure that plea bargaining is conducted consistently. Especially in rape cases where there are so many personal attitudes that can influence professional judgment, a more considered approach is required.

Standards for plea bargaining. It may be impossible to construct strict plea bargaining standards that apply to the multiplicity of circumstances which arise in criminal cases. Nonetheless, certain policy guidelines can be formulated for consideration in decision making. The very promulgation of such standards would at least force the consideration of an office's goals and assumptions regarding rape, although it might not allow one to predict the outcome of any particular plea bargain.[3]

The most important factors that the prosecutor must consider in reaching a plea bargain could be defined. For example, the seriousness of the crime, the strength of the case, the background of the defendant, the attitude of the victim, and the resources required for trial could be isolated as legitimate factors to be considered in plea negotiations. These factors could then be ranked or weighed in importance. If seriousness was considered more important than the expenditure of office resources, then a serious case would seldom be plea bargained even though it would be an expensive case to try. Those factors which made a case more or less serious could also be carefully articulated. For example, while the use of a weapon might be considered an aggravating circumstance, the chastity of the victim might be specifically excluded from consideration. If the prosecutor's office recommended sentences as part of a plea bargain, then particular aggravating and mitigating circumstances might be delineated. In addition, the policy regarding dismissal or reduction of charges in return for a plea could be specified.

The process of decision making itself could be standardized. For example, a checklist could be devised to insure that the decision maker at least considered factors that the office as a whole considered important. Exceptions to the standards could be required to be justified in writing so that a "common law" of exceptions developed. This would alert prosecutors to what is and what is not an exceptional case. Furthermore, if the decision making was centralized or reviewed by a single senior prosecutor, the pattern of consideration and exception could be made significantly more consistent.

A standardized process has many advantages. First, it tends to force decisions to be made on legitimate, articulated lines rather than on the basis of personal biases toward the crime, the victim or the defendant. While personal biases can be masked by such a procedure, this approach minimizes the risk that such factors will form the bases of decision making. Second, the use of standards allows an office to carefully consider and articulate its policy toward rape. The promulgation of such guidelines with its attendant discussion and debate may be valuable itself. Basic policy questions are often considered only on an *ad hoc* basis; the importance of these decisions demands a more systematic approach. Third, standards and guidelines allow prosecutors to consider the unique problems of rape, or any other crime, apart from the general flow of cases. Prosecutors may conclude that rape need not be singled out for special treatment, but that decision itself, if carefully considered, might be significant. On the other hand, after reviewing their present practices, prosecutors may decide that rape cases should be assigned special priority reflected in tougher plea negotiations. Regardless of the policy, the act of singling out the crime and examining its special features can be beneficial.

Consistent and deliberate plea negotiation necessitates a process for formulating and applying standards. Without standards, policy will remain vague and randomly applied. With specific regard to the plea bargaining of rape cases, the absence of guidelines may mean that individual value judgments and irrelevant concerns dictate policy.

Other policy considerations. Two additional issues arise in the plea bargaining of rape cases that may demand attention by administrators. The first concerns the use of polygraphs during plea negotiations, and the second involves victim and police involvement with plea

negotiations. Without clear direction from policy makers, individual deputies may apply inconsistent standards in these areas.

a. *The polygraph and plea negotiations.* The polygraph may serve a different function during plea bargaining than at the filing stage. By this point in the prosecution the state is presumably committed to its case and the defendant may have revealed the nature of his defense. Polygraph tests of either the defendant, or the defendant and the victim, may be considered to resolve obvious factual disputes and avoid trial. As noted in the discussion of filing, not every case may lend itself to such testing. In addition, some prosecutors reject the use of polygraphs under any circumstances.

Given this range of opinion regarding the polygraph, the prosecutor administrator might articulate policy with regard to its use during plea negotiations. The policy maker could, for example, determine that the office will not agree to defendant polygraph examinations and that exceptions to this rule must be approved by senior prosecutors. Furthermore, where an exception to the general refusal is allowed, guidelines could be established with regard to whether stipulation by all parties is required and what consequences follow from possible test results.

b. *Participants in the plea bargaining process.* While the power to plea bargain resides ultimately with the prosecutor, the question has arisen as to the appropriate roles for the victim, the police and others in the negotiation process. It is important for trial deputies to remember that the rape case is not "the prosecutor's case," but a crime against the state and its citizens; the prosecutor merely represents these interests. As an advocate for the victim and the police, he must consult them and consider their opinions. Too often the prosecutor assumes some possessive interest in the case; the opinions of even those most directly involved with the crime are considered tangential. As a practical matter, consultation with the victim and the police can provide the prosecutor with valuable information about the crime that has been lost in the process of having many police and prosecutors involved. Most importantly, such consultation may inform the prosecutor about the attitudes of the community toward the crime charged and the possibility of a negotiated plea.

Regular consultation with police and victims may be time consuming and even impractical. Such contact may also create expectations regarding influence in the decision that could lead to later problems. Consultation, however, should be part of a continuing relationship between the prosecutor, the victim, and the police. The victim should know from the time of filing that the case may be resolved through plea negotiations. She should also know that her opinions will be solicited, but that the prosecutor will have many other considerations to weigh as well. With regard to the police, continuing relations require that the police trust the prosecutor to represent their interests in the plea bargaining process. While the police assume that plea bargaining will resolve most cases, the time spent in consultation may be an investment in long-term cooperation.

Much of the public distrust for plea bargaining may emanate from its secretive nature. If standards are published, bargaining is conducted with consultation, and decisions are explained and justified, then it may be possible to portray plea bargaining more realistically. This process is not an illicit exception to the rule of law, but a legitimate and integral part of the criminal justice system.

6.3 Trial

If plea negotiations are not successful the case will proceed to trial. At this point, case responsibility is usually assumed by a single prosecutor who will develop the evidence, prepare his case, respond to pretrial motions and, ultimately, try the case. There are few policy issues that arise with regard to rape during this period, for generally the case will be prepared and tried like any other felony. However, one issue that must be considered concerns the investment of resources required for the successful preparation and trial of a rape case. It may be necessary to add support personnel for investigation or, more likely, to schedule the trial deputy's case load so that he can invest sufficient time to properly prepare the case.

There is no obvious formula to determine how much time is required to prepare for and try a rape case. Some serious crimes can be tried with little preparation, while less serious cases may be extraordinarily complex. However, rape cases generally tend to require significant preparation time, largely because of the need to prepare the victim. Some prosecutors interview the rape victim up to half a dozen times before trial, allaying her fears, reinforcing her decision to prosecute and preparing her for both direct and cross examination. If rape cases are to be given a high priority within the office, then prosecutor administrators should consider how to provide trial deputies with the time necessary to adequately prepare rape cases for prosecution.

6.4 Sentencing

Three policy issues arise with regard to the sentencing of defendants convicted of rape. While some of these issues pertain to other major felonies as well, the recent attention focused on the crime of rape suggests that they should be addressed specifically with regard to this crime.

a. *Sentencing recommendations.* There are few available standards or guidelines to suggest what sentencing recommendations are appropriate for what kinds of rape.

Many new legislative schemes would distinguish rapes by degrees, with each degree having a separate penalty.[4] In states which do not have this structure, it may be appropriate for the policy maker to devise a set of standards that will guide the prosecutor's office in making consistent and just recommendations.

In addition, a few states provide for sexual psychopath programs for convicted rapists; [5] the prosecutor should consider under what situations these programs instead of traditional incarceration might be recommended. Once again, most sentencing decisions are made on an individual *ad hoc* basis without any attempt to guarantee consistency or apply general office policy. If the prosecutor believes that rape is a crime that deserves serious attention, he can manifest a sense of priority by establishing guidelines for sentencing recommendations.

b. *Role of the sentencing deputy*. The role of the prosecuting attorney at the actual time of sentencing varies tremendously throughout the country.[6] In some jurisdictions, the prosecutor assumes an active, adversarial role at the sentencing hearing; he makes a recommendation and then argues for its adoption. In other jurisdictions, prosecutors remain passive, rarely making recommendations or becoming involved in the sentencing debate. It might be appropriate for the prosecutor administrator to formulate policy with regard to this function, especially in rape cases. If the office has given priority to rape, then this fact can be reflected at the time of sentencing. The prosecutor can emphasize this priority to the judge and advocate for a particular disposition.

c. *The participation of others*. The prosecutor might adopt policy regarding the participating of the victim and the police at sentencing. Guidelines could be established to routinely invite the victim and interested police officers to attend the hearing of the convicted rapist. Such a routine would represent a judgment by the prosecutor that the community, in the form of the victim and the police, should be more directly represented at the sentencing. A program which invited interested parties to the hearing might be expensive for a prosecutor's office; nonetheless, if it insured a sentence that reflects the interests of the community, the money might be well spent.

6.5 Conclusion

There are a number of policy decisions that can be made by a prosecutor administrator to reflect an aggressive posture toward rape prosecution. Traditionally, decision making with regard to rape has been made only on a case-by-case basis. The prosecutor administrator has the opportunity to consider the crime of rape more generally. Policy should be established which will encourage individual deputies to vigorously and imaginatively prosecute rape cases. Without clear direction from administrators, these cases will be treated like any other felony. Under these circumstances, they are unlikely to be successfully prosecuted.

NOTES

[1] The Seattle District Courts, King County, Washington schedule all preliminary hearings in sexual assault cases on a separate calendar. This allows the prosecutor to prepare more fully for the hearings and allows the court to better protect the privacy interests of the parties.

[2] For a general discussion of plea bargaining, see Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (Boston: Little, Brown, and Co., 1966); Arthur Rosett and Donald J. Cressey, *Justice by Consent: Plea Bargains in the American Courthouse* (Philadelphia: J. B. Lippincott Co., 1976). See also Marvin Marcus and Robert J. Wheaton, *Plea Bargaining: A Selected Bibliography*, National Institute of Law Enforcement and Criminal Justice, Law Enforcement and Assistance Administration, 1976.

[3] For a general discussion of the purpose and use of standards see Kenneth Culp Davis, *Discretionary Justice* (Baton Rouge, La.: Louisiana State University Press, 1969).

[4] See *Forcible Rape: An Analysis of Legal Issues*, published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project, Chapter 2.

[5] Washington State Law provides that upon petition by the prosecutor, and order by the court, the defendant may be sentenced to observation and then commitment to a program for sexual psychopaths administered by the state Department of Social and Health Services. See Revised Code of Washington, Chapter 71.06.

[6] See ABA Standards, The Prosecution Function, 6.1 (1971).

CHAPTER 7. GUARANTEEING EFFECTIVE PROSECUTION

It is the prosecutor administrator's responsibility to insure that rape cases are prosecuted effectively. Given the nature of this crime and its infrequent prosecution, this is an elusive goal. Clearly rape cases are difficult to prosecute. The factual situations are often ambiguous, the limited physical evidence is forensically complex, and the rape victims are often unwilling and frightened witnesses. Thus, it requires a skilled and experienced attorney to effectively screen, develop, and try rape cases.

Because rape cases are so infrequently filed and tried, there is little opportunity for prosecutors to gain experience or develop expertise. Even among the experienced rape prosecutors surveyed, the average number of rape trials was only slightly more than one per year per prosecutor. The experience of many prosecutors, especially those in suburban or rural areas, is likely to be much less. Theoretically, prosecutors could be trained to try rape cases even if their experience was limited. Prosecutors indicated, however, that there is virtually no training provided by prosecutor offices in any subject. Presumably lawyers learn to prosecute by on-the-job experience. Since both experience with rape cases and training is so limited, each lawyer must virtually rediscover independently how to screen, develop, and try rape cases each time one appears.

The prosecutor administrator is thus faced with the problem of adequately preparing lawyers to try rape cases. While this difficulty applies to all felonies, the inherent weaknesses of most rape cases and the vulnerability of rape victims make this problem especially important with regard to rape. This chapter explores strategies and techniques that are available to the prosecutor to address this difficulty.

7.1 Personnel

Perhaps the ultimate guarantor of effective prosecution is the assignment of cases to the best attorneys. In the context of rape, there has been some discussion as to whether the sex of the attorney makes a difference. It has been suggested that female prosecutors are generally more sensitive to the emotional needs of rape victims because they are better able to identify with them.[1] It is argued that at trial, however, the female prosecutor may give the jury the impression that because of her sex, she is too vindictive.

The survey of prosecutors conducted as part of this research revealed no preference with regard to the sex of rape prosecutors. Some attorneys argued that there are so few female prosecutors that there is little experience from which to judge. Most argued, however, that it is the personality and experience of the prosecutor, rather than the sex, that are the most important variables. In one office where rape cases were assigned to women, there was, in fact, some discontent among the women. They resented the assumption that their sex rather than their skills as attorneys would determine their handling of rape cases. Generally, prosecutors could cite examples of male and of female prosecutors who should or should not be assigned to these cases.

In addition to being skilled attorneys, prosecutors assigned to rape cases must be able to deal effectively with the special problems of rape. Every prosecutor may not have the interpersonal skills and interviewing techniques to communicate effectively with rape victims. Some prosecutors undoubtedly have ingrained attitudes that prejudice their judgment and potentially affect their commitment to these cases. It is unclear how an administrator tests for these factors, but the potential for bias should not be underestimated. Perhaps it is the most important job of the prosecutor administrator to assign rape cases to the appropriate personnel.

7.2 Specialization

One strategy employed by a number of prosecutors is to structure the office so that a small number of attorneys specialize in rape cases. While it is probably undesirable to restrict a prosecutor to rape cases only, it can be advantageous to assign all of the rape cases within the office to a limited number of attorneys. Each of these would handle many more rape cases than he would otherwise, but there would still be variety in his practice.

In some offices, one or two deputies are assigned to all rape cases from the moment of filing through trial. In Kansas City, for example, the prosecutor's office provides a 24-hour response to the scene of the rape or the local hospital.[2] The prosecutor can become actively involved with the police investigation and the victim at an early stage of case development and can remain with the case throughout its evolution. In another model, there is specialization at the time of filing but not at the trial level. In Seattle, for example, an attorney from a special Sexual Assault Unit interviews each rape victim before a filing decision is made. If the case proceeds to trial, however, any experienced prosecutor may be assigned to it. In most jurisdictions, rape cases are screened in an

unspecialized manner, though trial assignments are made to a small group of experienced attorneys who generally try all of the major felony cases.

These structural arrangements provide several potential advantages for the prosecution of rape cases. First, since rape cases would be the responsibility of relatively few prosecutors, experience can be accumulated. The assumption is that by exposure to more rape cases, the prosecutor will be better able to anticipate and respond to defenses and assess the strengths and weaknesses of his case—that he will respond more confidently and sensitively to the victim. With broader exposure, prosecutors will be able to make better judgments; new situations can be analyzed in light of experience. Second, when decision making is the province of a smaller group of attorneys, decisions will be made with more consistency. If there are fewer decision makers, there will likely be fewer personal factors in decision making. Third, communication and the sharing of experience among prosecutors would be enhanced by the creation of a specialized unit. If two or three attorneys are designated to assume this reponsibility, it is likely that interaction among them will be encouraged. This type of education is much more difficult when the limited experience with rape cases is spread thinly throughout the office. The creation of such a unit might also increase the status of its members during their tenure and, thus, signal a special office posture toward rape. Such recognition may encourage these attorneys to be more aggressive and imaginative in their prosecution of rape cases. Finally, specialization offers the potential of continuous case responsibility by one deputy, from screening through sentencing. This may be beneficial not only for case development, but also to the rape victim.

Prosecutors were surveyed with regard to their attitudes toward specialization. In those offices which did not have specialization, there was considerable skepticism expressed. Several prosecutors suggested that an attorney would become stale and even hardened after a period of time. If specialized prosecutors handled only rape cases, the seriousness and uniqueness of this crime might be depreciated. Given the career plans of many prosecutors, the thought of limiting any potential trial experience also seemed threatening. In addition, many prosecutors considered rape cases so unpleasant and emotionally draining that they indicated an unwillingness to volunteer for such a program. A policy maker would have to deal with such attitudes in implementing specialization. Those offices practicing specialization at filing or at trial, however, did not commonly receive these complaints—perhaps because each specialized attorney handled other felonies as well as rape and each attorney belonged to the specialized unit for only a limited period of time.

The greatest difficulty in implementing specialization may involve the integration of a rape unit within the traditional office structure. Prosecutor offices, especially large ones, are usually divided in terms of function rather than crime type. Different prosecutors are responsible for screening, preliminary hearings, plea bargaining, and trials. To cut across these functional divisions by isolating a certain crime type poses significant organizational problems. Prosecutors who handle the case through its entire development come from existing units that specialize in a certain function; and when the rape prosecutor presents the preliminary hearing for the rape case, the normal preliminary hearing attorneys may suffer "down time." A revised type of organizational structure has been tried successfully in some career criminal programs, though it has been made possible largely with the infusion of outside grant moneys. Nonetheless, it is a form of specialization that may have some precedent-setting value. An alternative approach would be to specialize within each functional unit when it is sufficiently large. Such specialization could enhance consistency in decision making and foster experience, though it would not provide the continuity that is beneficial to case development and victim interaction.

If a specialized rape unit is created, various additional benefits can accrue that are not directly related to individual prosecutions. For example, members of the unit can become involved in public education or provide the liaison with crisis centers, police sexual assault units, or hospital emergency rooms. They can begin to develop trial manuals for rape and promulgate standards for filing and plea bargaining. Eventually, the unit can generalize on its experience to deal more innovatively and productively with the crime of rape.

7.3 Training

There is generally very little formalized training conducted in prosecutor offices and, where it is conducted, it more often relates to office procedures than to the substance of prosecuting cases. Teaching may take place between individual prosecutors; one prosecutor with a problem will seek out another prosecutor who may have faced the issue before. Such education is accidental and haphazard; it assumes that one prosecutor will take the initiative to find another, that he can locate someone who has faced a similar dilemma, and that the advice received is worthwhile. Many prosecutors lament the lack of formalized training, but office administrators generally cite inadequate resources and energy to begin such programs.

Traditional formats for prosecutor training may also be ineffective. When there is training, it usually takes place in the form of late afternoon lectures given to the entire office by a guest or a senior prosecutor. For experienced prosecutors, the lectures are often elementary; for

inexperienced attorneys, there is little context in which to evaluate or appreciate it. In addition, few lawyers are anxious to stay after work to hear a presentation on something that is marginally relevant to the cases on which they are working. While there are exceptions to these rules, the lack of resources spent on training may correspond to the lack of enthusiasm for such instruction. The problems of training are compounded in the context of rape. Not only are some of the potential training topics rather esoteric—for example, the blood typing of seminal stains, but so few prosecutors are regularly involved with rape cases that the lectures represent curiosities that will have to be relearned if they ever become relevant.

Training sessions may be more effective if they occur outside the daily routines of prosecution. If they occur on noncourt days, weekends, perhaps in a setting different from the office, they may attract more interest and enthusiasm. The changed environment may suggest the importance of the topic and facilitate discussion that is often stifled by after-work meetings.[3]

Training may be most effective if it is directed toward a few prosecutors rather than the office as a whole. A small group of attorneys could be relieved of their normal duties to train intensively for the prosecution of rape cases. These prosecutors can then specialize in rape prosecution or at least become the focal point of information within the office. If someone has a problem with a rape case, he can turn to one of the prosecutors who have been identified with the issue. Such training might also be arranged in conjunction with police and rape victim advocates. It may not only be informative for the participants; it may serve to break down the barriers that sometimes emerge between these groups.

The content of rape training. Prosecutors who had experience with rape trials were asked to rate the importance of various topics that might be taught to inexperienced prosecutors in preparation for rape cases. The following rating is based on those responses which identified the topic as "very important":

Rank	Training Subjects	% Very Important
1	Techniques for interviewing victims	85%
2	Techniques of direct examination of victims	70%
3	Jury selection in rape cases	60%
4	Techniques to counter defense strategies	60%
5	Scope/usefulness of physical exam of victims	58%
6	Scope/usefulness of laboratory analysis of physical evidence	58%
7	Emotional impact of rape on victim	58%
8	Admission of physical evidence at trial	55%
9	Special problems of child victims	50%
10	Admission of victim's prior sexual history	42%
11	Techniques of direct and cross examination of criminalists	25%
12	Charging decisions in rape cases	18%
13	Pretrial motions in rape cases	18%
14	Special problems at grand jury or preliminary hearings	10%

The two topics listed most frequently by experienced prosecutors involve rape victims. The findings cited in Chapter 2 are borne out by this survey, for it suggests the importance of responding to the special needs of rape victims. Training prosecutors to interview and present rape victims at trial is necessary; in addition, special consideration should be given to the potential problems posed by very young, adolescent or elderly victims.[4]

The above list suggests the types of curricula that could be considered in the development of a rape training program. It should be noted that, with the exception of interviewing, many of these topics can probably be "learned" by a deputy assigned to a rape trial quickly enough to effectively try that case. On the other hand, the prosecutor who must screen rape cases or present the case on a crowded preliminary hearing calendar will already have to be familiar with these issues before the cases are assigned him.

Training methods. There are numerous ways in which prosecutors could be trained in these areas. Methods may be dictated by the resources and energy available; however, to consider only classroom presentations is to underestimate the potential of various learning experiences.

The standard lecture given by an invited expert or senior prosecutor is the most traditional form of presentation. This requires a meeting of all the prosecutors and the repetition of the lecture with each successive wave of personnel. The potential of this method can be enhanced if videotape equipment can be used. The lecture can then be recorded, edited, and made available to individual prosecutors as their time and needs permit. New prosecutors might be required to view a series of videotapes that were carefully prepared for long-term use.

Several videotapes and movies that address issues of rape prosecution are presently available for loan or purchase. Sexual assault seminars sponsored by district attorneys in California and Texas have been taped and include detailed presentations on the potential of forensic evidence in rape trials.[5] Also available is a short movie with a training booklet which focuses on the medical examination of rape victims.[6] There are commercially produced movies which are less extensive than the videotapes mentioned and serve the more general purpose of stimulating discussion and public education.[7]

There is also an expanding body of written materials on the nature of rape,[8] rape law,[9] and the forensic aspects of rape trials.[10] This material can be collected in a reference library and individual prosecutors could even be assigned to summarize the contents of articles for distribution throughout the office. It is very difficult to keep such materials in an up-to-date and readily retrievable form. No one, however, doubts the value of such resources when they are properly organized.

Perhaps the most effective training takes place in an experiential context. Interview simulations, videotaped for review by the participants, or critiqued by an audience, can effectively merge theory with practice. To the extent that attorneys can be closely supervised as they file and try actual cases, they can be educated while they perform their job responsibilities. Ideally, cases can be assigned jointly to both an experienced and an inexperienced prosecutor. The novice would be provided a first-hand opportunity to observe a senior prosecutor prepare and try a case. This is expensive training, but it is perhaps the most meaningful to the inexperienced prosecutor.

7.4 Conclusion

Rape cases seem to exacerbate existing problems in prosecutor offices. Prosecutor administrators must be concerned that filing and trial attorneys have the proper expertise and motivation to handle all types of cases. Administrators often face problems of inexperience among new attorneys and problems of inadequate motivation and aggressiveness among the most experienced. In addition, resources are not adequate to have the innovative training programs that would stimulate this broad range of expertise. In the context of rape, these problems can be especially significant. There is a need for experience and sophistication in dealing with rape and its victims, and yet there must be an open-mindedness and a commitment to what are often controversial and unpleasant cases to try. Administrators must become concerned with programs and policies that will motivate, prepare, and reinforce attorneys who prosecute rape cases.

NOTES

[1] For an interesting discussion of how men and women perceive the crime of rape see Shirley Feldman Summers and Karen Lindner, "Perceptions of Victims and Defendants in Criminal Assault Cases," *Criminal Justice and Behavior*, 3 (1976), pp. 135–150.

[2] Kansas City prosecutors reported that after a time they did not personally travel to the hospital after every rape. Based on the description of the case provided by the police, the prosecutor made a decision whether such a response was necessary.

[3] For example, the King County Prosecutor's Office (Seattle), Washington, and the Rape Reduction Project of Seattle, cosponsored a weekend seminar outside of Seattle for 10 prosecutors and 10 mental health professionals and rape crisis workers. The program included lectures, discussions, movies, and demonstration victim interviews.

[4] For information regarding the special problems of rape victims who are children and adolescents see Ann Burgess and Lynda Holmstrom, "Sexual Trauma of Children and Adolescents," *Nursing Clinics of North America*, 10 (1975), pp. 551–563; Vincent Capruro, "Sexual Assault of Female Children," *Annals of the New York Academy of Science*, 142 (1967), pp. 818–819; Walter L. Hogan, "The Raped Child," *Medical Aspects of Human Sexuality* (1974), pp. 129–130; Edwin I. Roth, "Emergency Treatment of Raped Children," *Medical Aspects of Human Sexuality*, 6 (1972), pp. 85, 89–91; Joseph J. Peters, "Children Who are Victims of Sexual Assault and the Psychology of the Offender," *American Journal of Psychotherapy*, 30 (1976), pp. 398–421; Ann Burgess and Lynda Holmstrom, "Rape: Its Effect on Task Performance at Varying Stages in the Life Cycle," *Sexual Assault*, eds. Marcia Walker and Stanley Brodsky (Lexington, Mass.: Lexington Books, 1976), pp. 23–24.

[5] The videotapes are available through the California District Attorneys Association, 923 12th Street, Suite 300, Sacramento, California, and the Texas District and County Attorneys Association, 1411 West Avenue, Suite 102, Austin, Texas 78701.

[6] See G. Richard Baen, M.D., "Rape Examination," available from Abbott Motion Picture Library, Abbott Park D383, North Chicago, Illinois 60064.

[7] One film distributor which has several titles regarding rape (e.g., "Reality of Rape" and "A Question of Consent") is Motorola Teleprograms, Inc., 4825 N. Scott Street, Suite 23, Schiller Park, Illinois 60176.

[8] See, e.g., bibliography in Lisa Brodyaga, et al., *Rape and Its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies*, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration (1975), pp. 213–217.

[9] See bibliography in *Forcible Rape: An Analysis of Legal Issues* published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project.

[10] See *Forcible Rape: A Manual for Filing and Trial Prosecutors* published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project, Chapter 3.

CHAPTER 8. COOPERATION WITH THE POLICE AND MEDICAL COMMUNITY

The prosecutor is only one member of a criminal justice team that responds to the crime of forcible rape. Both police [1] and hospital personnel [2] have central roles in the development of rape cases and their cooperative interaction with the prosecutor is essential to an effective response by the criminal justice system. Many of the issues which arise between these groups cannot be dealt with by individual trial and filing deputies. Rather, they require action from prosecutor administrators who can deal directly with policy makers within police departments and local hospitals. This chapter briefly explores some of the ways in which these groups can provide cooperative responses to the crime of rape.

8.1 Police

Police departments are organized in many different ways to respond to the crime of rape; their organizational structure may dictate the style of police/prosecutor interaction. Traditional police departments dispatch patrol officers to rape calls, and then provide follow-up investigative support by detectives a day or even several days later. The detectives may have little special training in rape cases, and in most smaller jurisdictions, they investigate many other crimes in addition to rapes. Several larger police departments have created specialized sexual assault units at the detective level. The detectives are often trained to respond to the special needs of rape victims and the difficulties of rape prosecution. They either report directly to the scene of the crime or begin their investigation within 24 hours of the time it is reported. Thus, depending upon the size of the department and its degree of specialization, prosecutors will interact with a variety of police personnel. These officers will respond to the crime with varying degrees of expertise, training, and sensitivity.

Prosecutors and police were asked about their perceptions of each other.[3] Many complaints were voiced which may be endemic to prosecutor/police relations and not specifically related to rape. Nonetheless, they seem to emanate from a general lack of communication that can influence the outcome of these cases. Prosecutors complain that the police are sloppy in their investigation of crimes. They either miss important evidence or improperly seize, mark, or store the evidence that is gathered. They fail to contact corroborating witnesses or to interview them adequately. Detectives are criticized specifically because they cannot be relied upon once their case has been filed. The police argue that prosecutors view their cases superficially and make filing and plea bargaining decisions without consultation and without regard to the quality of the investigation. They complain that prosecutors give inadequate guidance at the same time that they expect the police to file perfect cases. These general problems of communication have been attacked by a number of strategies throughout the country.

Many prosecutors have sought early involvement in complex cases such as rape. Some prosecutor offices have 24-hour-a-day liaison with the sexual assault units of police departments so that police and prosecutors can work together from the time of the rape report.[4] This not only facilitates rapport between agencies, but enables the police to better perceive the rape investigation from the prosecutor's perspective of possible trial. It also enables the police to respond more quickly and confidently to potentially complex legal problems, such as when and how to arrest or conduct a search.

Prosecutors have participated in the training of police for complex cases such as rape. The trading of information in the context of training allows each side to understand the needs of the other. The prosecutor, for example, can push consideration of defense tactics back into the police investigation so that the police can act more expeditiously to foreclose possible defenses. The paperwork requirements of the prosecutor can be better understood by the police if the utilization of such data can be fully explained. The police can be instructed regarding recent statutory changes, important case law, and local court trends in a manner that will facilitate their daily work.

Police and prosecutors have worked together to create standardized recording forms so that key issues to the prosecutor will be consistently addressed by the police. The diversity of reporting formats can be a severe problem to prosecutors who work with several police departments. Prosecutors have also encouraged the use of standard evidence gathering materials such as the "rape kit." [5]

Prosecutors have increased their efforts to keep individual police personnel informed about the progress of their cases. There is more sensitivity to the inconvenience suffered by the police when court hearings are

continued or prosecutors are unable to make appointments or return phone calls. Prosecutors and police have also met on a regular basis to discuss current cases, to review general problems of personnel, and to consider how past errors can be avoided. Formalizing general lines of communication can facilitate the spread of intelligence information between agencies.

Many of these specific programs do not have to be developed at the administrative level. If police and prosecutor administrators jointly acknowledge the importance of rape and the need for change, then they will have created a climate for cooperation. In terms of the development and implementation of programs, those prosecutors and police officers who deal with these issues daily can be delegated authority to discuss mutual problems and devise a blueprint for future cooperation.

Prosecutor-based rape investigators. Prosecutors are directly dependent upon law enforcement agencies for the investigation and development of rape cases. While larger jurisdictions may have specialized police units staffed with specially trained and experienced investigators, most police agencies do not receive a sufficient number of rape reports to justify such specialization.[6] In these jurisdictions a sophisticated response to rape reports might be provided through the use of investigators based in the office of the prosecutor.

Prosecutor-based investigators could receive the same training given to the members of other specialized rape units. Their main function would be to investigate rapes reported to any cooperating police agency within the prosecutor's jurisdiction. These personnel could supply the high levels of expertise needed in rape investigation that small police departments simply could not justify economically. Such investigators could provide liaison between the small departments and the prosecutor's office and bring together more closely the interdependent functions of investigation and prosecution. Support for such a program could be provided by assessing each of the cooperating law enforcement agencies a proportional amount of the operating costs. Although this approach has not yet been attempted, it is being considered in several jurisdictions.[7]

8.2 Medical Community

The cooperative relationship between local hospitals, physicians, and the criminal justice system seems to vary greatly. In some jurisdictions hospitals have worked actively to improve services to rape victims and to provide extensive forensic support to police and prosecutors. In other jurisdictions, however, examining physicians cannot be located to testify and the quality of medical care and emotional support needed to assist prosecution is inadequate. Hospitals provide a vital link in the preparation of rape cases for prosecution; they not only generate evidence for forensic purposes, but since they are often the first agency to come in contact with the victim, they may set the tone for future victim-criminal justice interaction.

There are a number of areas in which prosecutors and hospital administrators can work to enhance the possibility of successful prosecution. As in police-prosecutor relations, the very act of acknowledging potential problems and delegating personnel to work out solutions may have the effect of encouraging cooperation.

Evidence gathering. Hospital and prosecutor personnel can review procedures to gather, document, and preserve physical evidence. In rape cases various types of physical evidence, such as seminal fluid and pubic hair, must be properly marked and stored to maintain the chain of custody.

Medical examinations. Special medical procedures have been devised for the examination of rape victims so that the victim can be properly treated and the examining physician can collect the appropriate physical evidence. Existing medical protocols could be reviewed in light of standards suggested by the American College of Obstetricians and Gynecologists.[8]

Documentation of examinations. Prosecutor and hospital personnel could review the forms used to record the results of medical examinations and forensic tests. A standard form has been included in an appendix to this chapter to suggest both the extent of possible examinations and the type of documentation that can be available for police and prosecutors.

Training. Personnel from both agencies could be trained regarding the potential importance and technical aspects of forensic evidence. The need for proper documentation and preservation could be approached from both legal and medical perspectives.

Subpoena process. A simplified means of requesting doctors to testify could be arranged to insure notice and minimize the physicians' loss of time. In addition, the staffing patterns of emergency rooms could be reviewed so that qualified doctors would be available not only to treat victims, but to testify weeks or months later at trial.

Liaison. A representative from each organization could be delegated to act as liaison, either meeting regularly with representatives of other agencies or being on call to facilitate contact when needed. These representatives could act to solve particular problems as they arise or work on more long-range evaluation and planning.

8.3 Conclusion

If police, prosecutors, and hospital personnel coordinate their efforts, victims can be treated in a consistent and sensitive manner and rape cases can be developed with a greater potential for conviction. Such cooperation requires that these agencies interact, be willing to

criticize and accept criticism, and devote time and resources toward a common goal. It also requires a commitment by the prosecutor's office at the highest level. Although such cooperation will not guarantee a dramatic increase in victim reporting or conviction rates, it may be a necessary prerequisite to ending the traditional response of the criminal justice system to the crime of rape.

NOTES

[1] For a general discussion of the way in which police can respond to the crime of rape see *Forcible Rape: A Manual for Patrol Officers, Forcible Rape: A Manual for the Investigator,* and *Forcible Rape: Police Administrative and Policy Issues* published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project. See also Lisa Brodyaga, et al., *Rape and Its Victims: A Report for Citizens, Health Facilities and Criminal Justice Agencies,* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration (1975), pp. 1–55.

[2] See Lisa Brodyaga, et al., infra., pp. 55–86; Fay G. Cohen, Duncan Chappell and Gilbert Geis, "Changes in Hospital Care for Rape Victims," *Journal of Emergency Nursing*, (December, 1976), pp. 19–23.

[3] In addition to the 40 trial prosecutors who were surveyed, 251 police officers and 86 detectives were questioned about procedures and attitudes regarding rape.

[4] See H. Lake Wise, *Exemplary Project: Legal Liaison Division of the Dallas Police Department*, Office of Technology Transfer, Law Enforcement Assistance Administration (1976), for a general description of a police-prosecutor liaison program. With regard to rape, the prosecutor offices in Jackson County (Kansas City), Missouri and Johnson County (Olatha), Kansas, have a 24-hour liaison with the police.

[5] Generally "rape kits" contain various vials, envelopes, and a comb to gather and store physical evidence obtained from the rape victim. Information regarding the contents, use, and availability of such "kits" can be obtained from the Southwestern Institute of Forensic Sciences, 5230 Medical Center Drive, Dallas, Texas, 75235.

[6] According to the Federal Bureau of Investigation's *Uniform Crime Reports for the United States*, there was an estimated total of 56,093 rapes and attempted rapes reported in 1975 (p. 49). Of these, 41,304 were reported in the 6,510 American cities. The 57 cities with populations in excess of 250,000 received 56 percent (23,281) of these reports. The remaining 44 percent (18,023) were reported in the other 99 percent (6453) of the cities. In 94 percent (6094) of these 6453 cities, there was an average of less than 20 rapes or attempted rapes reported throughout the entire year; 66 percent (4282) of these cities received an average of less than one report during 1975. (Source FBI, UCR [1975], pp. 164–165.)

[7] See Frank J. Albi, "Prosecutor-Based Investigation: An Alternative Model for the Specialized Handling of Rape Cases," unpublished manuscript produced as part of this project.

[8] There are several publications designed for medical personnel which suggest how victims of sexual assault should be treated. See Jack H. McCubbin and Daniel E. Scott, "Management of Alleged Sexual Assault," *Texas Medicine*, 69 (September, 1973), pp. 59–64; "Suggested Rape," *American College of Obstetricians and Gynecologists Technical Bulletin*, Number 14 (1970, revised April, 1972); Ann W. Burgess and Linda L. Holmstrom, "The Rape Victim In the Emergency Ward," *The American Journal of Nursing*, 73 (1973), pp. 174–175; J.B. Massey, "Management of Sexually Assaulted Females," *Obstetrics and Gynecology*, 38 (1971), pp. 29–36.

ASSAULT VICTIM MEDICAL REPORT

Form A
Patient Interview Form

Please type or print all information clearly.
For explanation of each item, see corresponding number in associated protocol.

This report may be completed by any licensed or certified health professional.

---

1. **Date of Interview** _____ 2. **Time of Interview** _____

3. **Patient name** _____ (Last / First) 4. **Medical file no.** _____

5. **Patient birth date** _____ 6. **Patient Sex** _____ 7. **Phone** _____

8. **Patient address** _____ **Zip** _____

Permission for Interview, Examination and Release of Information

Permission is hereby granted to the medical staff of:

9. **Hospital/Clinic/Private Doctor Name** _____

10. **Address** _____

☐ **To perform a medical interview and a physical examination as may be necessary on the person of** _____.

☐ **To release the results of this examination and laboratory specimens and clothing to the proper legal authorities.**

11. **Patient signature** _____ 12. **Date** _____

13. **Or Parent/Guardian signature** _____ 14. **Relation** _____

15. **Witness signature** _____ 16. **Date** _____

---

16. **Patient's description of assault (Record in patient's words. Include all spontaneous utterances).**

17. **Date of assault** _____ 18. **Time of assault** _____

19. Note indication of pain in patient's own words:

20. Check pain and symptoms mentioned:

_____ skeletal muscular pain	_____ headache	_____ tenesmus
_____ abdominal pain	_____ bleeding	_____ dysuria
_____ pelvic pain	_____ discharge	_____ other

21. Has there been recent treatment of any disorder?

_____ No _____ Yes Describe _____

22. Has there been any cleansing since the assault?

_____ No _____ Yes Describe _____

23. (Vaginal assault only) LNMP _____

24. (Vaginal assault only) Date of last previous coitus before assault _____

25. Additional remarks:

I understand that the law considers the examining licensed or certified health professional as an eye witness in the body of events surrounding a potential crime. What a patient/victim says to medical staff may be admissable as an exception to the hearsay rule, and these statements may be important in determining the truth before a judge or jury. I agree to preserve these statements as part of this patient's history.

26. Interviewer signature _____

27. Interviewer name _____ 28. Title _____

29. (If known) Termination date of this employment _____

30. Interviewer fluent in English _____ Yes _____ No

ASSAULT VICTIM MEDICAL REPORT

Form B
Patient Examination Form

Please type or print all information clearly.
For explanation of each item, see corresponding number in associated protocol.
This examination and report may be completed by any licensed or certified health professional.

---

31. Date of examination _____ **32. Time of Examination** _____

33. Patient Name _____ **34. Medical File No.** _____
Last First

---

35. Appearance of patient's clothing: (Check if yes)

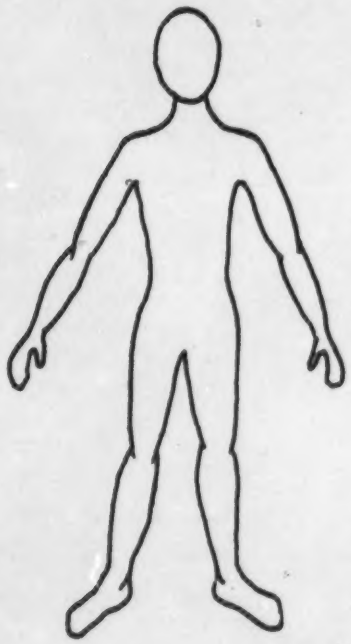
_____ Missing	_____ Soiled or muddy	_____ Leaves, grass embedded
_____ Torn	_____ Damp or wet	_____ Other as described
_____ Soiled	_____ Blood Stains	_____

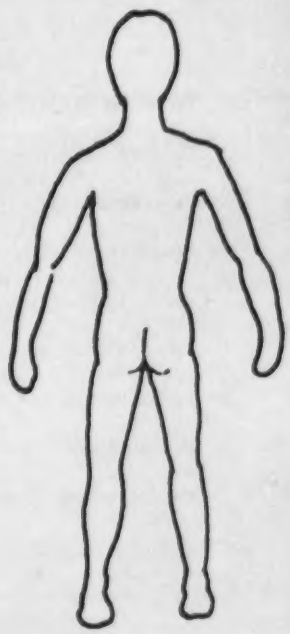
36. Patient changed clothing between assault and arrival at examination?

____ Yes ____ No

37. Itemize clothing placed in containers separately and tagged for evidence:

38. Describe presence of trauma to skin of entire body. Indicate location using chart. Describe exact appearance and size. Indicate possible source such as teeth, cigarette.





39. Itemize photos or X-rays of patient:

40. Describe external perineal or genito pelvic trauma:

41. Describe internal trauma (Speculum and bimanual examination):

_____ Lacerations present, Describe:

42. Is there discharge? ____ No ____ Yes Describe:

43. Checklist of symptoms of extreme mental trauma:

- ☐ Patient seems extremely quiet, passive, withdrawn, unresponsive - shows little emotion at all.
- ☐ Patient says little or nothing; seems unable to talk.
- ☐ Patient cries loudly and continually in a hysterical fashion.
- ☐ Patient laughs, jokes with those around - incongruously lighthearted.
- ☐ Patient expresses fear that his/her body was broken, permanently damaged or changed in some way.
- ☐ Patient exhibits serious breaks with reality, e.g. sensory, auditory or visual hallucinations.
- ☐ Patient expresses fears of falling apart, going crazy, disappearing.
- ☐ Patient refuses to leave the facility.
- ☐ Patient expresses suicidal ideation.
- ☐ Other_____

_____

44. Immediate Laboratory Examination of wet mount slide: (List source affected area and check result).

List Source Areas	Sperm Present	Sperm Absent	Sperm Motile	Sperm Nonmotile

45. Signature of Legal Authority receiving this information, clothing and the following specimens: _____

46. ☐ Air-dried cotton swabs - 2 sets from affected area (list body sources)

47. ☐ Dry unstained slides (list body sources)

48. ☐ Fibers from patient's body

49. ☐ Combing from patient's head

50. ☐ Combing from pubic area

51. ☐ 6-8 hair samples pulled from pubis

52. ☐ 12 strands patient's head hair pulled from different regions of head

53. ☐ Saliva sample: cotton cloth in patient's mouth and air dried

54. ☐ 4 drops of patient's blood dried on cotton cloth

I understand that the law considers the examining licensed or certified health professional as an eye witness in the body of events surrounding a potential crime, and that I may be called to testify and be cross-examined about my findings in this examination.

55. Examining health professional signature _____

56. Examining health professional printed name _____

Title _____

57. Supervising physician name, if any _____

58. (If known) Termination date of this employment _____

59. Examiner fluent in English

_____ Yes _____ No

ASSAULT VICTIM MEDICAL REPORT

Form C
Patient Treatment Record

Please type or print all information clearly.
For explanation of each item, see corresponding number in associated protocol.

---

60. Date of treatment _____ **61.** Time of treatment _____

62. Patient Name _____ **63.** Medical File No. _____
Last First

---

64. Statement of Patient's Rights.

1. You have the right to considerate and respectful care by doctors and nurses.
2. You have the right to privacy and confidentiality for yourself and your medical records.
3. You have the right to full information about treatment.
4. You have the right to refuse or choose treatment offered, and to leave the location of medical service when you wish.
5. You have the right to continued care and timely treatment of your future health problems related to this incident.

Tests given to patient:

65. GC culture ____ Yes ____ No **66.** VDRL ____ Yes ____ No

67. Pap smear ____ Yes ____ No **68.** Pregnancy test ____ Yes ____ No

69. Other information ____ No ____ Yes Describe:

Treatment given to patient:

70. VD prophylaxis ____ No ____ Yes Describe:

71. Medication given:

72. Medication prescribed:

73. Other treatment given:

Future treatment planned

74. Transfer to another medical facility Name _____

75. Appointment in 6 weeks for repeat GC culture, VDRL, and pregnancy test:

Date _____ Time _____ Place _____

76. Referred for counselling, or introduced for follow-up to:

INFORMATION TO THE PATIENT

ABOUT THE INTERVIEW

The doctor interviews you in order to decide what problems and injuries require attention and treatment. The law considers the doctor an eyewitness to a potential crime, so the doctor also needs to write down what you say about the incident.

ABOUT THE EXAMINATION

The appearance of your clothing and any sign of force or injury to your body are legal evidence for a possible criminal prosecution. Foreign matter on your body or on your clothing may also provide evidence. That is why the doctor should examine you carefully and completely, and collect specimens to send to the police crime laboratory. You should receive a receipt from the authority who takes your clothing to send to the laboratory.

ABOUT MEDICAL TREATMENT

If you have been assaulted by penetration in the mouth, the rectum, or the vagina, you should receive these tests and treatments:

1. Preventive treatment so you will not contact veneral disease (syphilis or gonorrhea). While the treatment takes effect, please refrain from sexual relations for ten days to avoid giving VD to another person.

2. A smear taken from the affected area and viewed under a microscope to find other infections, such as yeast or cervicitis.

3. In six weeks more tests can show if you have become infected by VD or if you become pregnant.

FOR YOUR OWN SAFETY REMEMBER TO HAVE THESE TESTS.

ABOUT PREGNANCY

There is about a 4% chance that you become pregnant from the assault if it occured any time in your cycle other than during ovulation, which usually occurs midway between periods. Even if you were ovulating the day of the assault there is only a 10% chance of becoming pregnant.

If you are concerned about becoming pregnant, these options are available:

1. To prevent a pregnancy from occuring, an endometrial aspiration can be performed before your next period is expected. This brief procedure involves the removal of the lining of your uterus. Consult your doctor or the closest office of Planned Parenthood for this treatment.

2. The examining physician may prescribe a drug, a synthetic estrogen, called diethylstibestrol (DES). If given within 72 hours of exposure this drug may prevent pregnancy. This drug may produce undesirable side-effects: it may make you feel sick and nauseated; it may harm the fetus if you are already pregnant or become pregnant with this exposure. Future pregnancies will not be affected.

You should not take this drug if:

a. You are now pregnant and plan to have the baby.

b. You have already been told by a doctor that you should not use estrogen birth control pills.

c. You have ever had cancer, diabetes, or certain forms of heart disease.

3. If you do become pregnant, between six and twelve weeks from the date of the first day of your last menstruation, a safe brief, and medically approved abortion will terminate the pregnancy. Consult your doctor or the closest office of Planned Parenthood for an appointment for this treatment.

4. If you wish to continue the pregnancy to birth, you may seek financial aid and adoption information from agencies listed in the telephone directory under adoption agencies or social service organizations.

ABOUT YOUR EMOTIONAL WELL-BEING

It is normal for you to have strong and uncomfortable feelings after this experience. You and your family need to understand that your feelings are acceptable and important. You may wish to talk about your feelings with a trusted friend, or with a counselor, who has skills to help you work through your doubts and settle the experience. This may take time, but many people feel that good counseling has saved them from a lot of confusion and pain later.

To help you understand what you are going through now and may be going through in the future, here is a description of the feelings people often experience after a crisis:

1. Up to two weeks afterward; feeling numb, stunned, afraid, angry, unable to sleep, unable to eat, physically sore, jumpy, feeling degraded or dirtied.

2. After two weeks: feeling moody, irritable at times, frustrated and angry, wanting to forget.

3. After several months: after a period of recovery, many people find that they suddenly feel depressed or worried again. This may be an indication that you have unfinished concerns, and feelings you cannot understand.

CONCLUSION

In the past six years the feminist movement has focused a vast amount of public attention on the problem of rape. The media have publicized numerous facets of a public discussion that has involved legislative debate, citizens' advisory committees, and even large research projects. Coincident with this public interest are growing expectations that the criminal justice system can treat rape victims with sensitivity and can control this crime.

The political realities of rape prosecution have undoubtedly contributed to an internal evaluation of the criminal justice system's response to this crime. Many problems have been acknowledged, and in various jurisdictions new approaches have been attempted. Though public interest may wane, the momentum generated by legislative action and the published literature will influence the criminal justice system for some time. In addition, feminist interest in rape is unlikely to be abandoned as other areas which concern the rights of women are explored.

For the prosecutor administrator, rape remains a challenging and difficult problem. The normal processes of the system are likely to suggest that rape cases are not aggressively prosecuted. The prosecutor administrator must set a tone for prosecution that will encourage deputies to pursue convictions and reinforce their concern for victims. Perhaps the number of convictions will increase. Surely victims can be better treated. While answers are not obvious, especially in light of other needs and limited resources, the problems of rape cannot be ignored.

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